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AIR HYGIENE FOUNDATION OF AMERICA, Inc.

Legal Series, Bulletin No. 1, Parts i and ii



A Survey of the Statutes and Court Decisions Respecting Occupational Disease from Air Pollution

(For the Confidential Information of members. Not for re-
production, wholly or in part.)

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Bulletin No. 1, Legal Series—Correction and Additions

Chap. I, Page 1—

Strike out last sentence and add: A separate chapter is then devoted to each state (including the District of Columbia) in alphabetical order, running from Chapter IV to Chapter LIII inclusive. Chapter LIII is then devoted to a review of medical examination under the various compensation acts. In Chapter LIV, there appears a brief summary.

Chap. II—

Page 3, Idaho.—Change last period to a comma and add: but the courts have very liberally construed "accidental injury" and have gone very far in holding disease to be the result of "accidental injury" and therefore compensable.

Page 4, Iowa.—In fourth line, change "dicta" to "obiter dictum".

Page 4, Kansas.—Delete paragraph and substitute: Covers "personal injury by accident" only.

Page 4, Maine.—Change second sentence to read: Diseases are excluded by court construction, except such cases as are caused by accident.

Page 5, Nebraska.—This state to be transferred to page 8.

Page 5, Nevada.—Change to read: Compensation is provided for "personal injuries by accident". Disease is not mentioned and is therefore excluded.

Page 5, New Hampshire.—Change second sentence to read: Occupational diseases are excluded, except such cases as are caused by accident.

Page 5, New Mexico.—Change second sentence to read: Occupational diseases are not covered.

Page 5, Oregon.—Change second sentence to read: Diseases are not mentioned and are therefore excluded, except such cases as may be caused by accident due to violent or external means.

Page 5, Rhode Island.—Transfer to page 9.

Page 6, Washington.—Change last sentence to read: Diseases are not mentioned and are therefore excluded, except such physical condition as results from injury of a traumatic nature.

Page 6, Wyoming.—Change last part to read: * * * result from an injury incurred in the course of employment.

Page 7, Illinois.—Delete present paragraph and substitute: Occupational disease is not compensable under the Workmen's Compensation Act. Silicosis and some other dust diseases are not compensable under the old Occupational Disease Act, which is effective until October 1, 1936. Under the new Occupational Disease Act, effective October 1, 1936, all occupational diseases, including silicosis, are compensable.

Page 8, Nebraska.—Nebraska should be inserted before, New Jersey, to read: Occupational diseases peculiar to the smelting or refining industries are compensable. The statute specifically excludes all others.

Page 9, New York.—Change paragraph to read: Compensation is payable for 27 enumerated occupational diseases if acquired in the occupation set opposite the particular disease in the schedule. By amendment effective September 1, 1935, group 28 was added, extending coverage to "any and all occupational diseases". By further amendment, effective June 6, 1936, silicosis and other dust diseases were removed from group 28 and made compensable under a separate chapter.

Page 9, North Carolina.—Insert "asbestosis and" before "silicosis".

Page 9, Ohio.—Change period at the end to a comma and add: asbestosis or other dust diseases.

Page 9, Rhode Island.—Insert Rhode Island immediately before West Virginia to read: Prior to September 15, 1936, the Act provided compensation for nothing but "personal injury sustained by accident". As of that date, an amendment became effective making 31 groups of diseases compensable. Silicosis, asbestosis and other dust diseases are not included.

Page 9, Wisconsin.—In second sentence, strike out "is" and substitute "and other dust diseases are".

Page 9, Note relative to Illinois.—Eliminate this note.

Chap. VII—

Page 32, line 27.—Change "1074" to "1075".

Page 33, line 15.—Change "1923" to "1933".

Chap. XIV, page 84.—Change last sentence of last full paragraph to read: "The court, in granting compensation, said: 'The expression of 'accident' is used in the popular and ordinary sense of the word, as denoting an unlooked for mishap or an untoward event which is not expected or designed.' The opinion reads:

Chap. XVII, page 125, line 22.—Insert the word "obiter" before "dictum".

Chap. XXXVI—

Page 328, line 22.—Change "69" to "869".

Page 330, line 2 of Section III.—Change "Section 14" to read "Section 1—4".

Page 331, line 5.—Change "Sec. 14" to "Sec. 1—4".

Chap. XXXVII, page 344, line 30.—Change to read: for an occupational disease are but obiter dicta.

LEGAL SURVEY

PARTS i and ii

With respect to Occupational Disease Resulting from Air Pollution, Comprising a Study of the Statutes and Court Decisions of States of the United States

Prepared for the Legal Committee

of

AIR HYGIENE FOUNDATION OF AMERICA, INC.

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FOREWORD

One of the important services of Air Hygiene Foundation of America to its members is the collection, evaluation and dissemination of factual information relating to industrial diseases—particularly the pneumoconioses, and especially silicosis.

In connection with the legal aspects of the problem, the firm of Williams, Eversman & Morgan, attorneys, of Toledo, Ohio, is engaged in making a study of the pertinent statutes and court decisions of all States in the United States.

Part i of this first bulletin in the Legal Series published by Air Hygiene Foundation of America, contains a resume of workmen's compensation laws as they affect occupational disease, and common laws and liabilities. Part ii includes detailed reports on Alabama, Arizona, Arkansas, and California. Subsequent parts to follow will consider the other States. Finally, an index will be issued.

It is desirable to make this knowledge available, without delay, to members for their confidential information and use.

H. B. MELLER,
Managing Director

Thackeray Ave. and O'Hara St.,
Pittsburgh, Pa.,
April 1, 1936

Control Sheet
p. 1

CHAPTER I

SCOPE AND PURPOSE OF SURVEY

The presence of hazards in industry due to air pollution is a matter of great interest, both to employers and employees. The problems which arise therefrom are at once recognized as legal as well as medical and engineering. No solution which will benefit society as a whole can be reached without intensive study of the manner in which the problem is affected by law. This survey is confined primarily to the laws as they now are, with some additional comment as to pending or prospective legislation where such information is obtainable. Such a study and analysis when made may be used as a starting point for future beneficial legislation.

It is manifest at the outset that this survey must be all too brief to discuss in detail all of the statutes and court decisions which bear upon the general subject. It is hoped, however, that it will be sufficiently comprehensive to indicate the general scope of the laws of each state and to facilitate a more intensive study thereof by one interested in the laws of any particular state. Due to the predominance of occupational disease resulting from exposure to dust, that field will receive particular attention. Among the afflictions due to exposure to dust, silicosis will receive special mention.

All but two states of the Union now have Workmen's Compensation Laws, and one major objective in this survey is to determine the manner in which Compensation Laws cover occupational disease. In some states, laws governing the operation of workshops and factories contain regulations which must be studied; in some, mining laws are of particular interest. In addition to these, there are many statutes of general character, such as employers' liability acts, which will be noted in the individual chapters digesting the state laws.

For convenient reference, Chapter 2 is devoted to a summary of the Workmen's Compensation Laws of the various states; and Chapter 3 is devoted to the law as established by court decisions, as distinguished from statutory law, which law so established by court decisions is commonly referred to as the "common law." A separate chapter is then devoted to each state, in alphabetical order, beginning with Chapter 4.

CHAPTER II

RESUME OF WORKMEN'S COMPENSATION LAWS AS THEY AFFECT OCCUPATIONAL DISEASE

The following tabulation is not submitted as a sufficiently exhaustive treatment of the subject, and reference must be made to the chapters covering the individual states for more adequate information.

Section 1.	States with No Compensation Acts:
Arkansas	
Mississippi	
Section 2.	States Having Compensation Acts Which Exclude Compensation for Occupational Disease, Either Expressly Or by Construction of Court:
Alabama:	Expressly excludes disease unless the disease shall result proximately from the accident.
Arizona:	Does not include a disease unless resulting from an injury by accident.
Colorado:	Allows compensation "where the injury or death is proximately caused by accident arising out of and in the course of his employment." This would exclude occupational diseases, except any such cases as are proximately caused by accident.
Delaware:	"Shall not include a disease or infection except as it shall result from the injury when reasonably treated." Injury, as used in the Act, means injury by accident.
Florida:	Includes such diseases or infections as result from such injury by accident.
Georgia:	"Shall not include a disease in any form except as it results naturally or unavoidably from the accident."
Idaho:	"Shall not include a disease except as it shall result from the injury." Injury must be the result of an accident.

Indiana:	"Shall not include a disease in any form except as it shall result from the injury." Injury must be the result of accident.		tinguished from the contraction of some disease." Occupational diseases are thereby excluded.
Iowa:	"Shall not include a disease unless it shall result from the injury." No requirement that the injury must result from accident but there is dicta to the effect that occupational diseases are not compensable under the Act.	Nebraska:	Expressly excludes occupational diseases in any form, except those which arise out of and during the course of employment and are peculiar to the smelting and metal refining industries.
Kansas:	Covers "personal injury by accident." Occupational diseases are excluded, unless resulting directly from such injury.	Nevada:	Occupational diseases are excluded, except such cases as are caused by accident.
Louisiana:	Only covers injuries by violence to the physical structure of the body and such diseases or infections as naturally result therefrom. Occupational diseases are excluded, except as above. Accident must be an unexpected, unforeseen event happening suddenly and violently, with or without fault, and producing at the time objective symptoms of an injury.	New Hampshire:	"Personal injury by accident" is compensable. Occupational diseases are excluded, except such cases as are caused by accident.
Maine:	"Personal injuries by accident" are compensable. Occupational diseases are excluded, except any such cases as are caused by accident.	New Mexico:	"Personal injury by accident" is compensable. Occupational diseases are excluded, except such cases as are caused by accident.
Maryland:	"Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment, and such disease or infection as may naturally or unavoidably result therefrom." The courts of Maryland have placed unusual constructions upon "accidental injury" and the chapter of this report on Maryland law must be consulted.	Oklahoma:	"Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such diseases or infection as may naturally result therefrom.
Michigan:	Covers "personal injuries arising out of and in the course of his employment." Occupational diseases are excluded by court construction, except where such is result of an accident.	Oregon:	"Personal injuries by accident caused by violent or external means," are compensable. Occupational diseases are excluded, except such cases as may be caused by accident due to violent or external means.
Montana:	"Injury refers only to an injury resulting from some fortuitous event, as dis-	Pennsylvania:	Injury means only violence to the physical structure of the body, and such disease or infection as naturally results therefrom. By construction occupational disease is excluded.
		Rhode Island:	"Personal injury sustained by accident." Occupational disease is excluded, except such cases as result from injuries by accident.
		South Carolina:	"Shall not include a disease in any form, except where it results naturally or un-

avoidably from an accident."

South Dakota:

"Shall not include a disease in any form, except as it shall result from the injury."

Tennessee:

"Shall not include a disease in any form except as it shall result from the injury."

Texas:

"Injury in course of employment" is compensable. "Injury shall be construed to mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom." Courts have declared the injury must be accidental.

Utah:

"Personal injury by accident" is compensable, and "shall not include a disease except as it shall result from the injury."

Vermont:

"Personal injury by accident" is compensable, and "shall not include a disease except as it shall result from the injury."

Virginia:

"Shall not include a disease in any form except where it results naturally and unavoidably from the accident."

Washington:

"Personal injuries" are compensable. "Injury" means a sudden and tangible happening of a traumatic nature. Occupational diseases are excluded, except such physical condition as results from injury of a traumatic nature.

Wyoming:

Personal injuries sustained in enumerated extra hazardous employments are compensable. The terms "injury" and "personal injury" shall not include a disease except as it shall directly result from the injury in the course of employment.

Section 3:

States Having Workmen's Compensation Acts Which Include Compensation for Occupational Disease, Either Expressly Or by Construction of Court:

California:

Injury includes "any injury or diseases arising out of the employment, including injuries to artificial members." Silicosis is compensable by court construction.

Connecticut:

Includes occupational diseases as defined. "The words 'occupational disease' shall mean a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of the employment as such." Silicosis is compensable by court construction.

District of Columbia:

Injury includes "such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury * * *." No decision involving silicosis, but it would undoubtedly be compensable under the Act.

Illinois:

Silicosis is covered by Section 1 of the Occupational Disease Act, but this act was declared unconstitutional in 1935. Only Section 2, dealing with the manufacture and handling of lead, brass, zinc, etc., is in existence today. It would seem that silicosis was not included within "accidental injury" which is compensable under the Compensation Act.

See note.

Kentucky:

* * * personal injury by accident as herein defined shall not include diseases except where the disease is the natural and direct result of a traumatic injury by accident, nor shall they include the results of a pre-existing disease, but shall include injuries or death due to the inhalation in mines of noxious gases or smoke commonly known as 'bad air,' and also shall include the injuries or death due to the inhalation of any kind of gas. * * * and any employers and their employees engaged in the operation of glass manufacturing plants, quarries, sand mines or

in the manufacture, treating or handling of sand may, with respect to the disease of silicosis caused by inhalation of silica dust, in like manner voluntarily subject themselves thereto as to such disease."

Massachusetts:

Disability resulting from occupational disease is compensable in Massachusetts by court interpretation. This is because of a provision in the Act for making a claim for compensation, alleging that an injury is due to an occupational disease, and also because there is no requirement that an injury result from an accident in order to be compensable. The only requirement is that it be a personal injury arising out of and in the course of employment.

Minnesota:

Disability resulting from any of the twenty-three occupational diseases enumerated in the Act is compensable. Silicosis is not included in this list.

Missouri:

The terms "injury" and "personal injury" "shall in no case, except as hereinafter provided, be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, * * *. Nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases, unless the employer shall file with the commission a written notice that he elects to bring himself with respect to occupational disease within the provision of this act. * * *"(This makes it possible for the employer by election to bring occupational disease under the Act.

New Jersey:

The Act covers only eleven diseases which are specifically enumerated. Silicosis is not so enumerated.

New York:

Compensation has been extended to cover any and all such diseases incurred in any and all of the employments enumerated in the act.

North Carolina:

The schedule enumerates twenty-five compensable occupational diseases, including silicosis.

North Dakota:

The term "injury" includes, in addition to any injury by accident, any disease proximately caused by the employment.

Ohio:

The Act covers twenty-one enumerated diseases. The list does not include silicosis.

West Virginia:

Disability or death caused by silicosis is compensable at the election of the employer, subject to certain limitations. No other occupational diseases are covered by the Act.

Wisconsin:

Injury is mental or physical harm to an employee caused by accident or disease. Silicosis is compensable by court interpretation.

**NOTE RELATIVE
TO ILLINOIS:**

New occupational disease legislation, including provisions with respect to silicosis, is pending and will doubtless be passed very soon. If available, it will be covered in the chapter of this report dealing with Illinois law.

CHAPTER III

COMMON LAW RIGHTS AND LIABILITIES

1. **Definition of Common Law.** What is the "common law"? The Supreme Court of the United States has said:

"The common law is reason dealing by the light of experience with human affairs." 100 U. S. 584.

Chancellor Kent has referred to the common law as "those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

Roughly speaking, our common law is the law as defined and announced by court decisions, which decisions are not based upon any constitutional or legislative provisions and, ordinarily, though not with entire accuracy, the term "common law" is used in contradistinction to statutory law. Where constitutional provisions or statutory provisions exist, they govern, as construed and applied by the courts. A relatively small part of our law is, however, found in statutes; the great bulk of it is found only in court decisions. The field of common law is therefore measured only by the number of court decisions. To explore it thoroughly, requires unlimited time and patience; yet no one can say, with reasonable certainty, what the law as a whole is, on a given subject, without spending much time and energy in such study.

To a large extent, the common law of America was inherited from England; and it is therefore a common possession of all of the states. For this reason, the decisions of the courts of one state are respected by the courts of another state, and there is a general tendency for the courts of all states to render harmonious decisions upon matters not covered by constitutional or statutory provision. Such uniformity however is not necessary, as the Supreme Court of any state may refuse, if it so chooses, to follow the decision of the Supreme Court of another state. This makes it necessary to study the decisions of the state in which a cause of action arises, but, if no decisions upon the point at issue can be found in that state, it should be assumed that the weight of authority as established by decisions in other states will be followed. This is an important fact to be kept in mind when studying a question as to which the law is just now crystallizing as, for example, with respect to recovery for occupational disease.

Even though occupational disease, including silicosis and

other ailments due to exposure to dust or other forms of air pollution, is not compensable under Workmen's Compensation Laws in a given state, and even though a particular operation may not be covered by any statutes of that state, the circumstances may be such as to give rise to the right of the employee to recover against the employer, on the theory that the employer was negligent, that is, remiss in some duties which he owes to the employee. This would be a recovery under the common law.

2. **Definition of Occupational Disease.** If we are to properly evaluate court decisions, it is necessary to know the exact meaning of the terms and expressions used by the courts. An examination of the authorities discloses that there exists considerable confusion as to the meaning of the term "occupational disease." According to some courts, an occupational disease is a disease which is normally incident to a particular occupation, and which could not have been prevented by any amount of care on the part of either the employer or the employee. For convenience, we may refer to this as definition No. 1. This may be said to be an occupational disease in the strict sense of the term. The view of other courts is that an occupational disease is one peculiar to a certain occupation, or to occupations having the same type of hazards, and which is sufficiently well recognized that precautions can be exercised to prevent its occurrence. This, for convenience, we may designate as definition No. 2.

For occupational disease as defined in definition No. 1, there can be no recovery at common law, for the obvious reason that it does not result from negligence of the employer. Under Workmen's Compensation Laws, however, where they cover occupational disease, an award could be, and in most cases would be, made, inasmuch as the right to recovery of such award would not be predicated upon negligence.

As a general rule, the employee has the right at common law to recover damages for occupational disease as defined in definition No. 2 if it can be shown that the disease resulted from negligence of the employer and if the employee has done nothing himself to bar his right of recovery.

3. **Right of Recovery Is Based upon Negligence.** At common law the employee has no right to recover damages from his employer for personal injury, i. e., either traumatic injury or occupational disease, unless the employer is guilty, in some manner, of negligence. To state this proposition is easy, but to apply it is difficult. Negligence of the employer may con-

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sist either of the commission of some act or the failure to act. Perhaps the failure to act when duty to the employee requires action gives rise to the greater part of the litigation between employees and employers.

It is well settled at common law that the employer owes the employee the duty to furnish him a reasonably safe place to work and reasonably safe instrumentalities to work with. This does not mean that the employer insures the safety of the place of employment, but he must use reasonable care and prudence to see that it is safe. Ordinarily the employer is charged with a higher degree of knowledge of the dangers incident to the employment than is charged against the employee. If the employer knows of dangers incident to the employment, it is his duty, not only to take precautions against those dangers, but to warn the employees of the dangers. His failure to so warn is usually considered negligence.

The duty of the employer to provide a safe place to work and safe instrumentalities with which to work will change and increase with the employer's knowledge of his business. What is today reasonable care in a certain industry may not be reasonable care tomorrow in the light of facts developed by research or of increased knowledge of dangers lurking in that business. A few years ago, the extent of the danger of exposure to certain dusts may have been unknown both to industry and to medical science. Consequently there would have been no common law right of action by one injured through exposure to such dusts. If today the effects of inhaling such dusts are known, it becomes the duty of the employer to take reasonable precautions to protect the employees against those dangers and failure to do so would constitute negligence giving rise to a common law action. The common law develops with human experience and to a large degree keeps abreast of the times. The basis of liability, however, never changes, to-wit—recovery must be based upon negligence of the employer, which is the failure of the employer to use reasonable care for the protection of the employee.

Where dust hazards are involved, the exercise of reasonable care on the part of the employer requires him to use modern and efficient means of testing the degree of air pollution and to use modern and efficient means of ventilation. It is not within the scope of this report to suggest what means should be adopted for testing air pollution. There are, however, several recognized methods of taking dust count; and doctors and engineers now have very definite opinions, and are fairly well

in agreement, as to the quantities of dust of various kinds which can safely be tolerated in a place of employment. An employer cannot fail to make adequate tests and expect a jury to absolve him from a charge of negligence. If the operations are such that the degree of air pollution cannot be reduced to a point of safety, the exercise of reasonable care would require that dust guards, masks, or respirators be furnished the workmen. All such equipment must, of course, be of proved efficiency. Furthermore, the employer must see that such equipment is maintained in good condition and that it is actually used. The duty of the employer is not fulfilled with the furnishing of individual protective equipment if he permits or countenances the failure of the employees to use the equipment. The general tendency of jury verdicts and court decisions is to hold the employer to higher degrees of care in these regards. This does not mean that an employer must adopt all new devices, but he must be able to show that the device and the equipment which he uses and which he furnishes to the employees are adequate for their intended purposes, and are such as reasonable persons would employ under the circumstances. If equipment admittedly better than he is using is available, it will be extremely difficult for him to convince a court and a jury that he has exercised due care unless he has adopted such improved equipment.

Because of its relation to the subject of common law liability, it should be noted that the violation of any statutory requirement as to working conditions or safety devices constitutes negligence per se and the employee has a right of action for damages resulting from such violation.

4. **Assumption of Risk and Contributory Negligence.** The usual defenses of the employer are that the employee assumed the risk of the employment or that the employee was guilty of contributory negligence. Either defense, if proven, constitutes a bar to recovery by the employee. The two defenses are quite similar but not identical. A discussion of the technical differences would not be particularly useful in this survey.

It is a well established principle of law that an employee usually assumes those risks which are ordinarily incident to the discharge of his duties in the particular employment, and those not ordinarily so incident but of which he has actual or constructive knowledge with full appreciation of the dangers that may flow therefrom. Most industrial employment involves certain dangers which are inherent in the operation and which no amount of care can eliminate. Such risks the employee

ordinarily assumes, and he cannot recover damages if he is injured by reason of such dangers. It cannot be said, however, that he assumes the risk of dangers of which he does not know. It is therefore manifest that assumption of risk is difficult to establish with respect to injuries to health suffered through long continued inhalation of polluted air, for it is difficult to establish that the employee had sufficient knowledge of such danger.

Negligence of the employee which contributed proximately to the injury or physical condition of which he complained will bar recovery. In cases arising out of the breathing of polluted air, contributory negligence would consist of remaining at work with knowledge of the conditions and dangers. Therefore, for practical purposes, contributory negligence does not differ materially from assumption of risk in such cases.

It should be noted that, in practically all statutes prescribing measures or devices designed to protect employees, the defenses of assumed risk and contributory negligence are denied the employer in the event the statutes are violated and accident or injury results.

5. **General Comment.** The foregoing are submitted as general statements only of common law principles. The extent to which statutes have modified the common law must be determined by a study of the laws of the individual states. Furthermore, where several states have statutes of almost identical wording, they may be construed differently by the courts of the respective states in which they are in force. An effort will be made to cite, in connection with the study of the state laws, a sufficient number of decisions of the courts of each state to indicate the peculiar manner, if any, in which it has modified the common law.

CHAPTER IV

ALABAMA

1. Workmen's Compensation.

1. Statutes. The Workmen's Compensation Law is found in the Code of Alabama, ch. 287, Secs. 7534-7613. Ch. 127, Secs. 3992-4003 cover the subject of violations of the Workmen's Compensation Act. Ch. 306, Secs. 8329 and 8330 relate to the duties of the Superintendent of Insurance, as compensation commissioner ex officio.

2. Administration. The Act is administered by the courts supervised in some respects by the Superintendent of Insurance. Inquiries may be addressed to the Superintendent of Insurance of Birmingham, Alabama.

3. Scope of the Act. Sec. 7534 provides in part:

"When personal injury or death is caused to any employee by an accident arising out of and in the course of his employment, of which injury the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he, or in case of his death, his personal representative, for the exclusive benefit of the surviving spouse and next of kin, shall receive compensation by way of damages therefor from the employer, * * *"

Sec. 7596 entitled "Words and phrases defined" contains the following pertinent definition:

"The word 'accident' as used in the phrases 'personal injuries due to accident' or 'injuries or death caused by accident' * * * shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing at the time injury to the physical structure of the body, by accidental means."

These definitions exclude occupational disease, except such disease as results proximately from an accident. Occupational disease, as such, is therefore not covered by the Workmen's Compensation Law.

4. Court Construction.

In *Chapman v. Railway Fuel Co.*, 101 So. 879 (1924), where death was caused by breathing noxious gas in a mine, recovery at common law was denied on the ground that the accident which primarily caused the death brought the case under the Workmen's Compensation Law, and that the remedies under that law were exclusive. This decision as reported does not describe the accident, but the record outside the reported decision discloses that the noxious gas was inhaled suddenly

that the occurrence was construed as an accident, as distinguished from occupational disease which would result from long, continued exposure to noxious gas resulting in gradual impairment of health.

In *New River Coal Co. v. Files*, 109 So. 360 (1926), compensation was allowed for injury and disability of the employee resulting from breathing carbon dioxide or carbon monoxide, or both, to which he was suddenly exposed when a hole was drilled into an inner room of a mine. The Court held that the injury was referable to a definite time, place, and circumstance as the event "happened suddenly and violently" so that it was distinguished from occupational disease.

In *Crescent Coal Co. v. Simmons*, 116 So. 512 (1928), compensation was allowed for the death of a mule driver who was kicked in the side, and which injury aggravated existing appendicitis, thus hastening the progress of the appendicitis and eventuating in death.

In *Southern Cement Co. v. Walthall*, 117 So. 17 (1928), compensation was allowed on account of the death from apoplexy of an employee fifty-eight years of age, who, while afflicted with arteriosclerosis, was injured by a blow on the head, which blow hastened the death from the existing disease.

In *Goslin-Birmingham Mfg. Co. v. Gantt*, 131 So. 905 (1930), compensation was allowed for death resulting from blood poisoning which followed an injury.

II. Other Statutes.

No statutes are found regulating workshops and factories. Sec. 1655 of the Code of Alabama, however, requires the ventilation of mines, including the entrances thereto, so as to provide for circulation of air to an extent that will dilute, carry off, and render harmless the noxious and explosive gases generated in the mine. If violation of this statute should result in personal injury as defined in the Workmen's Compensation Law of this state, the employee would be entitled to compensation therefor. If disability resulted due to continued exposure, so that the affliction would be construed as an occupational disease as distinguished from accidental injury, it is presumed that a common law right of action would exist although that question seems to be an open one in Alabama.

111. Common Law Liability.

No cases can be cited squarely in point as to whether a common law right of action exists in favor of an employee who suffers occupational disease disability due to negligence of the employer, but it is to be presumed that the general rule

would be followed in this state, to-wit, that such right does exist. Such right would of course exist only in case negligence of the employer could be established.

IV. Miscellaneous Matters of Interest.

1. *Statutes of Limitations.* By Sec. 7570 of the Code, the right to compensation under the Workmen's Compensation Law is barred unless compensation is agreed upon under the Code or a claim is filed within one year after the accident. Death claims are barred unless within one year after death, when the death results proximately from the accident within three years, the parties shall have agreed upon compensation or shall have filed a claim. Actions at common law for personal injury must be filed within one year, and for death within two years.

2. *Pending Legislation.* As of March 1, 1936, there were no bills pending in either house with respect to dust hazards, silicosis, or other occupational diseases.

CHAPTER V ARIZONA

I. Workmen's Compensation.

1. Statutes. Revised Statutes of Arizona, Secs. 1391-1457.

2. Administration. The law is administered by the Industrial Commission of Arizona, consisting of three members appointed by the governor by and with the advice of the senate for a term of six years, and inquiries may be addressed to that Commission at Phoenix, Arizona.

3. Scope of the Act. In Sec. 1420, the following pertinent definition appears:

"'Personal injury by accident arising out of, and in the course of employment' shall include an injury caused by the wilful act of a third person directed against an employee because of his employment, but does not include a disease unless resulting from the injury; * * *"

Sec. 1421 provides that every employee designated in the Act " * * * who is injured, and the dependents of every such employee who is killed, by accident arising out of and in the course of his employment, wheresoever such injury has occurred, unless purposely self-inflicted, shall be entitled to receive, and shall be paid such compensation * * *."

Occupational disease is therefore not covered by the Workmen's Compensation Law of this state.

This act was passed pursuant to the mandate of Sec. 8 of Article XVIII of the state constitution. It is not limited in its application to hazardous occupation, which distinguishes it from the Employers' Liability Law, hereinafter discussed.

4. Court Construction.

In *Pierce v. Phelps-Dodge*, 26 P. (2d) 1017 (1933), compensation was denied where a miner died from myocarditis, which heart disease was accelerated by the ordinary and usual conditions of his occupation, namely, his usual work as a shift boss. The Court said in part:

"* * * when compensation is awarded in any manner for a disease there must have been (a) an unexpected event which was (b) the cause of an injury to the person, (c) which injury must have produced or aggravated a disease. Nor can the disease itself be the injury produced by the unexpected event, since the statute specifically says it must be the result of the injury."

This case was cited and the above statement affirmed in *Phelps-Dodge Corp. v. Industrial Commission*, 49 P. (2d) 391 (1935).

II. Employers' Liability Law.

This Act comprises Sec. 1384 to 1390 inclusive of the Revised Statutes of Arizona and is distinct from the Workmen's Compensation Law. It was enacted pursuant to a mandate contained in Sec. 7 of Article XVIII of the state constitution. Sec. 1384 provides in part:

"To protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, * * * any employer, * * * shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

Sec. 1386 declares many occupations to be hazardous. This section includes in part:

"* * * 2. all work when making, using, or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive; * * * 10. all work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises."

Sec. 1388 provides that, in all actions brought under this Act, the question of contributory negligence or assumed risk shall be questions of fact at all times, regardless of the state of the evidence, shall be left to the jury, and contributory negligence shall not bar recovery but damages shall be diminished by the jury in proportion to the amount of negligence contributable to the employee. Contrary to the apparent meaning of this section, it was held in *Phoenix-Tempe Stone Co. v. Jenkins*, 28 Ariz. 291, 237 P. 194 (1925) and *Tarbell v. Rivera*, 251 P. 553 (1926), that assumption of risk is not a defense in an action brought under the Employers' Liability Law.

If a cause of action arises under this Act, the employer is at a distinct disadvantage, for the Arizona courts have held numerous times that liability under this Act exists without regard to negligence or fault of the defendant employer. It is only necessary that the injury be sustained while the employee is performing his duties in one of the occupations designated by the statute as hazardous.

Inspiration Consol. Copper Co. v. Mendez,
19 Ariz. 151, 166 P. 278 (1917);
Arizona Copper Co. v. Burclago,

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20 Ariz. 85, 177 P. 29 (1918);
Silver King of Arizona M. Co. v. Kendall,
23 Ariz. 39, 201 P. 102 (1921);
Consolidated Smelting Co. v. Egich,
22 Ariz. 543, 199 P. 132 (1920);
Miles v. Lavender,
10 F. (2d) 450 (1926).

All cases arising under this Act appear to have involved traumatic injury and the courts have not been called upon to decide the extreme breadth of meaning of the words "death or injury caused by any accident." If, when that question arises, the courts adopt the usual definition of accident, the statute will not apply to injuries to health resulting from exposure to dust. In other words, it will not apply to occupational disease. If, however, the courts adopt a more liberal definition and hold that occupational disease is covered by the Act, it would doubtless apply to almost every industry where such hazards exist. As indicated above, the Supreme Court of Arizona has already held that the injury suffered need not be due to the inherent character of the work. An illustrative case of this character is *Tarbell v. Rivera*, 251 P. 553 (1926), where the employee was engaged in shoveling sand in a lumber bin at the defendant's plant, in which plant gasoline was used as the motive power to operate the machinery and appliances. While shoveling, a large splinter was run into his hand when he struck it against the side of the bin. Blood poisoning resulted. The Court held that he was engaged in a hazardous occupation under Article 10 of Sec. 1386 above quoted. Consequently he had a right of action under the Employers' Liability Act.

Sec. 1387 provides that action for damages under this Act shall not be maintained unless commenced within two years from the date the cause of action accrued.

III. Other Statutes.

1. *Employer and Employee. Revised Statutes of Arizona, Secs. 1350-1383.* These sections comprise Chapter 24 of the Code. They do not contain provisions with respect to regulations of dust hazards, but they are of general interest to employers of labor in this state. They regulate the hours of labor and the employment of females and minors.

2. *Mines and Mining. Revised Statutes of Arizona, Secs. 2266-2307.* This is Chapter 51 of the Code. Administration of this chapter is delegated to the state mining inspector. He is directed to visit and inspect every mine at least once every

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three months and to "examine into the operation, conditions, safety appliances, machinery, sanitation and ventilation therein, the means of ingress and egress and the means taken to protect the lives, health and safety of the miners, the cause of accidents and death therein * * *". (Sec. 2281) If a dangerous condition is found, he must notify the operator of the mine. (Sec. 2283) Among other requirements, at all mines a supply of first aid remedies shall be kept readily accessible. (Sec. 2288)

Sec. 2295 is as follows:

"Ventilation. Pure air shall be made to circulate through and into the shafts, winzes, levels, and other working places of every mine, in such quantity as will maintain them in a fit state for working and passing therein. In dry places where the operation of a power drill will produce dust, all power drills used therein shall be equipped with a spraying device, and an adequate spraying system shall be installed and used to settle all dust or gases created. The total quantity of carbon dioxide present in the air shall not exceed twenty-five one-hundredths per cent by volume, except where firing of explosives has been done a higher percentage is permissible for a reasonable length of time after the last explosion, and the operator shall provide respirators whenever needed. Waste timber in underground workings shall not be piled up and permitted to decay, but shall be removed as soon as practicable."

By Sec. 2304, violation of any provision of this Act where no other penalty is expressly provided is declared a misdemeanor.

IV. Defenses Denied by the Arizona Constitution.

In Article XVIII of the state constitution, several interesting and rather unusual provisions appear which affect the right of recovery at common law by denying the employer certain defenses. By Sec. 4 of that article, the common law doctrine of fellow servants, so far as it affects the liability of a master for injuries to his servants, is forever abrogated. By Sec. 5, it is provided that the defense of contributory negligence or of assumption of risk shall in all cases whatever be a question of fact, and shall at all times be left to the jury. This prevents a court directing a verdict on the ground of contributory negligence or assumed risk. By Sec. 6, it is provided that the right of action to recover damages for injuries shall never be abrogated and the amount recovered shall not be subject to any statutory limitation.

V. Common Law Liability.

In the absence of decisions to the contrary, it is to be assumed that common law liability for occupational disease exists in Arizona, provided negligence of the employer can be established as the cause thereof.

By Sec. 2059 of the Revised Statutes, it is provided that actions shall be brought within two years after the cause of action shall accrue, with respect to personal injuries. Where death ensues from such injuries, the action shall be considered as having accrued at the death of the party injured and the action must be brought within two years thereafter.

CHAPTER VI ARKANSAS

I. Workmen's Compensation.

There is no Workmen's Compensation Law in this state. It is one of two states in the Union not having such law, the other being Mississippi.

II. Other Statutes.

In a general way, it may be said that the other statutes of Arkansas relating to the liability of employers for injury to employees are little more than a codification of the common law.

All references to statutes herein are to Crawford & Moses' Digest of the Statutes of Arkansas 1921 and Supplements thereto.

By Secs. 6535 to 6548, the Bureau of Labor and Statistics (address Little Rock, Arkansas) is given general supervisory control of commercial, social, educational, and sanitary conditions of employees and places of employment.

By Sec. 7137, a right of action is given to employees of railroad companies, all corporations of every kind and character, and all companies engaged in the mining of coal, for injuries or death resulting from the careless omission of duty or negligence of the employer or the agent, servant, or employee of such employer. By Sec. 7144, the cause of action is made to survive the death of the employee. By Sec. 7145, contributory negligence is denied the employer as a defense, but the damages are to be diminished by the jury on account thereof, except however that the employee may not be deemed guilty of contributory negligence in case the accident results from the violation by the employer of any statute enacted for the safety of the employees. By Sec. 7146, the employer is denied the defense of assumed risk where the injury is caused by the employer's violation of a safety statute.

By Sec. 7263, every mine operator is required to provide and maintain sufficient ventilation, and the minimum is specified as 100 cu. ft. of air per man per minute, measured in the manner specified "so that said mine shall be free from standing gas of whatsoever kind." By Sec. 7269, a right of action is given for injury occasioned by wilful violation of the requirements to ventilate mines, which cause of action survives the employee in case of death.

III. Common Law Liability.

Although no cases can be cited, it is assumed that the gen-

eral rules for common law liability would be followed in Arkansas and that recovery for occupational disease, as well as injury, could be had if it could be established that the disease was caused by the negligence of the employer.

CHAPTER VII CALIFORNIA

1. Workmen's Compensation.

1. **Statutes.** The original Act was passed in 1911 and has been amended many times. Because of the numerous amendments and the failure to codify these amendments into a single chapter of the statutes, it is difficult to indicate concisely where any particular provision will be found in the statutes. The practice has been to cite any particular provision by chapter and section of the laws of the year when it was enacted. A pamphlet copy of the Act, including all amendments, can be procured by writing the Industrial Accident Commission at San Francisco.

2. **Administration.** The law is administered by the Industrial Accident Commission for the Department of Industrial Relations. Inquiries may be addressed to the Industrial Accident Commission, State Building, San Francisco, or State Building, Los Angeles, California.

3. **Scope of the Act.** Par. 4 of Sec. 3 of the Act, as amended by Ch. 471, Laws of 1919, which provision is still in force, contains the following definition:

"The term 'injury,' as used in this Act, shall include any injury or disease arising out of the employment, including injuries to artificial members.

In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to aggravation of such prior disease as may reasonably be attributed to the injury."

Occupational disease, including silicosis and other dust diseases, is therefore compensable under Workmen's Compensation in California. The California courts have so held in several reported decisions.

The maximum compensation (except for penalties under certain circumstances) for permanent total disability is 65% of the average weekly earnings for a period of 240 weeks, and thereafter 40% of such weekly earnings during the remainder of life. The compensation is scaled down in accordance with the severity and permanency of the injury. Temporary partial disability compensation amounts to 65% of the weekly loss in wages during the period of such disability. If the injury causes death, either with or without disability, burial expenses not exceeding \$150 are paid and death benefits, governed as to amount by the number of dependents left. The maximum for death benefits is an amount which, when added to the disa-

bility indemnity accrued at the time of the death, will make the total disability indemnity and death benefits equal to three times the average annual earnings; such average annual earnings to be taken at not less than \$333.33 or more than \$1,999.92, provided, however, that said death benefits, when added to the disability indemnity accrued at the time of death, shall not exceed the sum of \$5,000. The death benefits are payable in installments equal to 65% of the average weekly earnings upon the employer's regular payday, but not less frequently than twice in each calendar month.

Attention is called to the following penalties:

(1) Under subpar. (b) of Sec. 6 (Ch. 471, Laws of 1919, and subsequent revisions), if the employee is injured "by reason of the serious and willful misconduct of the employer, or his managing representative, or if the employer be a partnership, on the part of one of the partners (or a managing representative or general superintendent thereof), or if a corporation, on the part of an executive or managing officer or general superintendent thereof," the amount of compensation otherwise recoverable is increased one half; but such increase may not exceed \$2,500. This penalty has been applied many times and the application upheld by the California courts, illustrations of which are hereinafter discussed.

It should be remembered that any such penalty is borne by the employer, either directly or indirectly. If the employer carries his own insurance, he pays the penalty directly. If an insurance company carries the risk, the employer eventually pays the full amount of awards, including penalties, by way of additional premiums.

In conjunction with the foregoing penalty statute, attention is directed to the following sections which are more or less declaratory of the common law, but which emphasize the necessity of furnishing a safe place to work, any violation of which might well be considered "serious and willful misconduct":

"Sec. 34. Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein, and shall furnish and use such safety devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life and safety of such employees.

"Sec. 35. No employer shall require, permit or

suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life and safety of such employees, and no such employer shall occupy or maintain any place of employment that is not safe.

"Sec. 36. No employer, owner or lessee of any real property in this state shall construct or cause to be constructed any place of employment that is not safe."

Even though the Commission may not have issued specific orders with respect to the use of safeguards against dust hazards, the employer must apply all of his knowledge of the processes of his business and the dangers incident thereto, and any failure to use such safeguards as would be dictated by present day knowledge might well be considered "serious and willful misconduct."

(2) By Sec. 29 (Ch. 471, Laws of 1919), every employer is required to secure the payment of compensation, either through insurance carriers or by self-insurance operated with the consent of the Commission. Subsec. (b) of Art. II of said Sec. 29 provides that if the employer fails to so secure payment of compensation, the injured employee or his dependents may proceed against such employer by filing an application for compensation with the Commission and may also bring an action for damages, with the right to attach the employer's property for the full amount recovered, including attorneys' fees. Subsec. (c) provides that failure to secure the payment of compensation shall constitute a misdemeanor on the part of the employer, punishable by a fine of not more than \$500 or imprisonment of not more than six months, or both. In case of the willful failure by the employer to secure the payment of compensation, the amount of compensation otherwise recoverable shall be increased 10%; but such increase shall not exceed \$1,000.

Where the right to compensation exists, that right is, under this Act, the exclusive remedy against the employer for injury or death.

In all cases where the injury or death is not covered by the Workmen's Compensation Law, it is provided that the liability of the employer shall be the same as if the Act had not been passed. In other words, a common law liability exists where

the death or injury does not come within the terms of the Workmen's Compensation Act.

In case of disability, proceedings under the Act must be begun within six months after the injury; in case of death, within one year after death and not more than 240 weeks after the injury.

By Sec. 39 of the Act, the Commission is empowered, by general or special orders, rules, or regulations or otherwise, to declare and prescribe what safety devices, safeguards, or other means or methods of protection are well adapted to render safe the employees of every employment and place of employment; to fix such reasonable standards and prescribe, modify, and enforce such reasonable orders for the adoption, installation, use, maintenance, and operation of safety devices, safeguards, and other means or methods of protection as may be necessary; and to require the performance of any act necessary for the protection of employees.

To date the Commission has not issued any general rules or prescribed any safety devices with respect to employments involving dust hazards; but the Commission held a series of hearings during February, 1935, for the purpose of formulating safety orders applicable to employment where there is a dust hazard.

4. **Court Construction.** That silicosis is compensable under the Act is recognized in a number of cases, including *Associated Indemnity Corp. v. State Industrial Accident Commission*, 12 P. (2d) 1074 (1932), and *Marsh v. Industrial Accident Commission*, 18 P. (2d) 933 (1933). Both of these cases also discuss the important question of when the time begins to run against the claimant; in other words, when, in case of silicosis, the injury occurs.

In the *Associated Indemnity* case, the applicant was one L. R. Harvey, who suffered from silicosis. He had worked for the American Encaustic Tiling Company fourteen years and during the last four years had been exposed to silica dust. His application for compensation was filed November 13, 1930. The insurance company carrying the employer's risk claimed that the filing date was more than six months after the injury occurred. Prior to 1928, the applicant noticed a shortness of breath. During the summer of 1928, he required frequent rest periods. He first had to leave work June 22, 1930, which was five months prior to the filing date. The Court held "disability accrued for the first time when the applicant had to quit work by reason of his physical incapacity, namely, June 22, 1930." The claim was therefore allowed.

In the *Marsh* case, three claims were considered together. They were based on different facts, but all involved silicosis and the question as to when the injury occurred. The Court announced the general rule that the California statute is to be liberally construed for the protection of the person injured and said:

"For the purpose of compensation, the injury dates from the time when the diseased condition culminates in an incapacity for work. It is at that time that the employer's liability becomes fixed; for until then the workman had received no injury in the legal sense, though the seeds productive of the injury had lodged in his frame long before."

Of similar import is the case of *Giminez v. Industrial Accident Commission*, 23 P. (2d) 425 (1923).

An interesting discussion of the meaning of "serious and wilful misconduct" in the application of the 50% penalty clause is found in *Hoffman v. Department of Industrial Relations*, 284 P. 451 (1930), where the injury arose by reason of the installation of a defective plank in temporary flooring, which plank was laid in violation of a statute. The employer, Hoffman, was constructing a steel frame of a six-story apartment house. The California statute required temporary flooring on each story as the work progressed. He used floor joists to span 15 feet 3 inches without center support, in violation of the requirement that any such temporary flooring spanning more than 13 feet should have center support. A concealed knot in one of the planks caused it to break and the workman was injured. The Industrial Accident Commission assessed the 50% penalty, but the Court reversed that finding, apparently on the theory that the real cause of the injury was the concealed knot and consequently the employer did not have sufficient knowledge to constitute wilful misconduct.

The Court quoted with approval from previous cases as follows:

"* * * 'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees.' * * * 'It has frequently been said that wilful misconduct involves the knowledge of the person that the thing which he is doing is wrong. Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe

condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as "evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of."

In another and later case, *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 288 P. 66 (1930), the award was increased by addition of the 50% penalty by reason of the employer's "serious and wilful misconduct," which consisted in the failure to install a guard around a circular saw. The employer installed new machinery, including a circular saw, which was a combined cross-cut and rip saw. Not being familiar with the machinery, the president of the Employing Company engaged an industrial engineer to supervise its installation. He allowed the saw to be used a week without a guard, as "he hadn't gotten to the safeguarding point yet." He intended to install a guard sooner or later, and before the machinery installation was considered completed. Both he and the president of the Company knew that there were regulations requiring such guard.

The Court held that these facts warranted the assessing of the penalty, saying:

"* * * 'Wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

Although these cases and others of similar import do not deal with dust guards, it is manifest that the failure to use a recognized safety device against inhalation of dust or gases would be a wilful omission under the definition quoted in the case last above discussed. Furthermore the legal duty to use such safety devices grows with the general knowledge of such hazards, and the adequacy of protective devices with respect thereto.

II. Other Statutes.

As will be observed from the foregoing discussion, the regulation of industry with respect to dust hazards is a duty of the Industrial Accident Commission in administering the Workmen's Compensation Law. One other statute claims our attention. Act 4720, Sec. 1, California General Laws 1931, provides:

"The owner * * * of every foundry or metal shop engaged in casting, fabricating, or working over in any manner, of iron, brass, steel, or other metal or compound * * * shall establish and maintain for

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the use of the employees * * * (certain toilet and bathing facilities) * * *. The room (where the same were installed) "shall be kept properly ventilated and protected, so far as may be reasonably practicable, from the dust and fumes of foundry or metal shop."

III. Common Law Liability for Disease.

Prior to the enactment of the Workmen's Compensation Law, recovery could be had at common law for occupational disease, as is evidenced by the case of *Pigeon v. Fuller Co.*, 105 P. 976 (1909), where a judgment for \$5,000 was awarded the plaintiff, who suffered from lead poisoning. As pointed out above, it is provided in Sec. 29 of the Workmen's Compensation Law that, in the event the employer shall fail to secure the payment of compensation, the employee "may bring an action at law against such employer for damages, the same as if this Act did not apply." This has the effect of preserving the common law right of action where the employer does not comply with the Workmen's Compensation Law.

IV. Miscellaneous Matters of Interest.

1. **Statutes of Limitations.** Aside from actions under the Workmen's Compensation Laws, actions for personal injury must be brought within one year.
2. **Pending Legislation.** There is no pending legislation with regard to dust hazards, but an interim committee of the California State Assembly is now making a survey of dust hazards, including silicosis, as a foundation for future legislation. As above stated, the Industrial Accident Commission, pursuant to the power vested in it, is also holding hearings for the purpose of evolving for future adoption safety orders with respect to dust hazards.

**AIR HYGIENE FOUNDATION OF
AMERICA, Inc.**

Legal Series. Bulletin No. 1. Part iii



**A Survey of the Statutes and Court Decisions
Respecting Occupational Disease from
Air Pollution**

*(For the Confidential Information of members. Not for re-
production, wholly or in part.)*

PITTSBURGH, PENNSYLVANIA

MAY 23, 1936

LEGAL SURVEY

PART iii

With respect to Occupational Disease Resulting from Air Pollution, Comprising a Study of the Statutes and Court Decisions of States of the United States.

Prepared for the Legal Committee

of

AIR HYGIENE FOUNDATION OF AMERICA, INC.

by

WILLIAMS, EVERSMAN & MORGAN,

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FOREWORD

This part (iii) of Bulletin No. 1, Legal Series, Air Hygiene Foundation of America, contains an analysis of the statutes and court decisions, affecting occupational disease, of ten States and the District of Columbia.

Part i was a resume of workmen's compensation laws as they affect occupational disease, and common laws and liabilities; part ii included detailed reports on Alabama, Arizona, Arkansas, and California.

Other sections will be published as rapidly as the material is assembled.

H. B. MELLER,
Managing Director

Thackeray Ave. and O'Hara St.,
Pittsburgh, Pa.,
May 25, 1936

CHAPTER VIII COLORADO

I. Workmen's Compensation.

1. Statutes. Compiled Laws of Colorado 1921. Secs. 4375-4525.

2. Administration. The law is administered by the Industrial Commission of Colorado consisting of three persons who devote their entire time to such position. The Commissioners are appointed by the Governor, by and with the advice and consent of the Senate, for terms of six years. Not more than two of the Commissioners can be members of the same political party and not more than one can be classed as a representative of employers or of employees. Inquiries may be addressed to that Commission at Denver, Colorado. The Commission is empowered to prescribe rules for the protection of the life, health, and safety of employees in the state; this will be treated later.

3. Scope of the Act. Sec. 4389 provides:

"The right to the compensation provided for in this Act, in lieu of any other liability whatsoever to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, on and after August 1st, 1915, shall obtain in all cases where the following conditions occur:

* * *
* * *

"(c) Where the injury or death is proximately caused by accident arising out of and in the course of his employment, and is not intentionally self-inflicted."

Disability or death resulting from an occupational disease is therefore not covered by the Workmen's Compensation Law of this state unless such results from an injury by accident within the contemplation of this section of the Act.

4. Court Construction.

In *Carroll v. Industrial Commission*, 69 Colo. 473, 195 P. 1097 (1920), the Commission awarded compensation where the evidence showed that strenuous work of pitching alfalfa hay in an inclosed building, combined with breathing dust-laden air, brought on an attack of heart trouble causing instant death, and also that the work would not have brought on a heart attack if it had been done in the open air.

The Court held that the polluted condition of the air was the proximate cause of the death and that the result was unexpected, unintended, and unforeseen. The conclusion was that it was an injury by accident within the meaning of the Workmen's Compensation Act.

In *Prouse v. Industrial Commission*, 69 Colo. 382, 194 P. 625 (1920), a mine employee died from an infection by the germ of septicaemia or pyaemia claimed to have resulted from working in a poorly ventilated atmosphere. In the process of work, Prouse and others had broken into an old, inclosed entry, tapping foul air and gas. Prouse worked intermittently in this bad air for a period of from two weeks to two months.

The Court denied compensation on the grounds, first, that the death was not the result of an injury by accident because there was no accident traceable to a definite time, place and cause, and because it was not unexpected since the employee knew and had been warned by his physician of the danger, and, secondly, because the occurrence was not shown to be the proximate cause of the death since there was no evidence that the employee would not have contracted the disease and died if he had not worked in the gas.

There was a vigorous dissenting opinion on the ground that *Carroll v. Industrial Commission*, supra, controlled in this situation.

In *Columbine Laundry Co. v. Industrial Commission of Colorado*, 73 Colo. 397, 215 P. 870 (1923), death resulted from pneumonia produced by the inhalation of an extra large amount of exhaust gas from an automobile which deceased was repairing on a definite morning. Compensation was awarded, the Court pointing out that the injury was unexpected, was traceable to a definite time, and was the proximate cause of the death.

In *U. S. Fidelity & Guaranty Co. v. Industrial Commission of Colorado*, 76 Colo. 241, 230 P. 624 (1924), death was caused by the inhalation of an excessive amount of gas at a fixed hour in the day. The deceased had been subjected to the continued inhalation of gas during his employment, but the excessive inhalation in this instance accelerated the fatal effect of such gas upon his system. His death would not have occurred at the place or at the time had it not been for this occurrence.

In awarding compensation, the Court said:

"These findings necessitate an award for the claimant. The deceased got an unexpected, excessive, accidental dose of gas, which, with his pre-

vious inhalations, produced death. His death would not have occurred when and where it did but for this unexpected inhalation. Since the draft of gas which killed him was accidental, it is immaterial whether his health had been impaired by previous inhalations, so that the final draft was rendered fatal. See *Ellermann v. Ind. Com.*, 73 Colo. 20, 22, 213 P. 120.

"But the plaintiff in error says that there is no evidence to justify a finding that the final dose of gas was anything more than the end of a gradual accumulation of the bad effects of the daily breathing of gas in the works, and that it shows that such was the fact. We agree with the proposition that, if this were clearly the case, the commission and the district court were wrong, but we have read all the evidence, and it shows that the deceased went to work at about 3 p. m., and at about 9:30, without previous warning, fell unconscious and died, without regaining consciousness.

"His physicians testified that, in their opinion, an inhalation greater than usual, plus his condition from previous ones, caused his death. We cannot say, therefore, that the findings are without evidence, and so must leave them unchanged."

In *Industrial Commission v. Swanson*, 26 P. (2d) 107 (1933), the employee, a mine superintendent, suffered an unusual and unnecessary exposure to down drafts caused by the accidental opening of the door guarding a tunnel to the mines, and, as a result, he contracted pneumonia and died.

Compensation was granted on the ground that this was a mishap, wholly unforeseen, unexpected, and unintentional, and therefore was an accident within the meaning of the Act.

In *Peer v. Industrial Commission of Colorado*, 29 P. (2d) 636 (1934), plaintiff was denied compensation for an osteomyelitis infection of the wrist bone. In her employment as cook and dishwasher, she frequently scraped kettles with a metal instrument shaped like a putty knife, but there is no evidence that such instrument slipped or broke the flesh on her hand, or that anything unusual happened that day.

The Court stated that an accident under the Workmen's Compensation Act must be traceable to a definite source, and that the burden of proof was on the claimant to show that her injury was the proximate result of an accident arising out of and in the course of employment, but that here there was no evidence of an injury by the utensil or what the cause of the injury actually was.

In *Industrial Commission v. Ule*, 48 P. (2d) 803 (1935), the

deceased was employed to spray dope upon the bodies and wings of airplanes by means of a spray gun. His exposure to the dope had not exceeded five hours per month during a total period of six months. He had during this time shown symptoms of poisoning from such dope, but it had not interfered with his work. However, on May 21st, 22nd, and 23rd, he was subject to an unusual and excessive exposure when two spray guns were employed. The evening of May 23rd he was forced to quit work and died within a short time thereafter.

The Industrial Commission had disallowed compensation on the ground that the disability resulted from occupational disease and was therefore not compensable. The court reversed the Industrial Commission and held that the disability did not result from occupational disease and that it was therefore compensable. In so doing, the court defined an occupational disease as a disease contracted in the usual and ordinary course of events, and which, from the common experience of humanity, is known to be incident to a particular employment. It pointed out that nothing in evidence indicated that the disability of May 23rd was the natural and reasonably expected result of the employment, or that the disease was contracted in the usual course of events, or was one which from common experience was or is known to be incident to the employment, or one due wholly to causes and conditions which were normally and constantly present in the employment, and concluded that deceased did not die of an occupational disease, as defined. The opinion stated that the fact that dope spray had been inhaled on previous occasions causing some ill effects, did not make the injury caused by the unusual and excessive inhalations on May 21st, 22nd, and 23rd any the less an accident.

The same principles were announced in *Industrial Commission v. Barton*, 52 P. (2d) 670 (December, 1935), where compensation for "housemaids' knee" was denied to a carpenter, because the evidence showed it to have been due to continuous strain, rather than accident.

5. Effect upon Right of Action at Common Law. For a discussion of this subject, see Section III, under the heading "Common Law."

II. Other Statutes.

1. Title 11—Industries, ch. 53, Mines and Mining, Subdivision 13, which treats of Bureau of Mines and Mine Legislation, Secs. 3383-3432. The provisions of this Act are administered by the Bureau of Mines, with a Commissioner of Mines as its

administrative head. There are no specific dust statutes in this Act, nor is the Bureau empowered to promulgate general health and safety rules. However, Sec. 3391 (as amended in Session Laws of Colorado, 1931) requires that:

"* * * The Commissioner shall, on receipt of reliable information indicating a condition injurious or dangerous to the health or safety of the workmen employed in any operating mine, ore mill, sampling works, smelter, metallurgical plant, rock quarry, excavation of a public or quasi public nature, clay pit, tunnel or mine working of whatever kind or character, except coal mines in the State, or whenever he deems such inspection necessary, examine or instruct one of the inspectors to examine and report to him the condition of the same. The owner, agent, manager or lessee, shall have the right to appeal to the Commissioner on any difference that may arise between such parties and the inspector."

Sec. 3394 provides that the Commissioner shall, upon finding a dangerous condition which threatens the bodily injury of the workers, give notice to remedy such defect. If such is serious, the Commissioner shall request it to be done immediately; and, if there is a refusal, the Commissioner is empowered to clear the mine of all persons.

Sec. 3430 makes it a misdemeanor and provides a penalty for failing to comply with the provisions of the Act.

These statutes in themselves charge an owner of a mine with no specific duty in relation to dust. There is therefore nothing in these sections, in the absence of an order by the Commissioner, upon which an employee could base a charge of negligence on the part of the employer in the event of a suit for disability resulting from an occupational disease.

2. Title 11—Industries, ch. 54, Coal Mines, Subdivision 6, General Regulations, Secs. 3545-3613. The chief inspector of mines and six deputy inspectors are charged with the duties of enforcing the statutory regulations with respect to coal mines. Their powers and duties are almost identical to those granted the Commissioner of Mines in regard to mine regulations in general. There are, however, certain specific statutes which deal with ventilation and dust. Sec. 3558 (as amended in Session Laws of Colorado, 1931, P. 198):

"The owner of every coal mine, whether operated by means of shaft, slope, or drift, shall provide and maintain pure air in said mine, and as a means to that end shall cause to be circulated throughout said mine, by fan from the outside of

said mine, pure air in an amount of not less than one hundred cubic feet per minute for each person therein employed, and five hundred cubic feet per minute for each horse or mule in said mine, which air shall be distributed and circulated by the "split system" in such manner as to dilute, render harmless, and expel the poisonous and noxious gases from each and every working place in the said mine. All other means of removing gases from coal mines are hereby prohibited. PROVIDED, That in mines in which no more than three persons including the owner are employed or work underground, natural or artificial ventilation may be used. Accumulated gas shall not be permitted to exist after discovery in any mine longer than may be necessary to remove such accumulation and such accumulation shall not be removed in such manner as to endanger the lives of the men in the mine. In order to insure an uninterrupted circulation of air throughout the mine workings, all air-courses must be securely and amply timbered and maintained and kept free from obstruction. Non-inflammable material shall be used in the construction of all permanent stoppings, overcasts and undercasts."

Sec. 3574:

"The owner of any coal mine shall not permit undue accumulation of fine coal or coal dust in any part of the mine."

Sec. 3610 makes violation of any provision of this Act a misdemeanor and provides a penalty therefor.

Secs. 3558 and 3574 create a duty on the part of the mine owner in regard to the accumulation of dust which may be the basis of an action for disability resulting from the breathing of the dust-laden air if proper precautions are not taken to eliminate dust in a mine. However, no cases were found wherein these sections were made the basis of a suit under such circumstances.

3. Title 14—Protection and Regulation of Labor, ch. 74 Employer and Employee, Secs. 4150 to 4207. In this chapter, certain general statutes relating to employers' liability should be noted.

Sec. 4167:

"That every corporation or company which or individual who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, servant or employee resulting from

the carelessness, omission of duty or negligence of such employer, or which may have resulted from any carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

This section abrogates the fellow servant rule.

Sec. 4168 provides that, in the event of a death from an act of negligence, as provided in the preceding sections, an employer shall be liable to an action for damages and that the jury shall fix the damages not to exceed \$5000.00.

Sec. 4169 provides who may sue in case of such death.

Sec. 4170 provides that actions for injury shall be brought within two years after the injury occurs, or, if death results, within two years after death.

Sec. 4171:

"Whenever any agent, servant, or employee while in the performance of his duty for his employer, shall be injured or killed in the employer's service on account of the employer's negligence or on account of any defect or peril connected with ways, works, machinery or instrumentalities used in the business of the employer, which could have been remedied or made more safe by the use of ordinary diligence, a recovery for such injury or death may be had, and the fact that such employee had knowledge of the defect or peril, shall not be a bar to a recovery, unless the repairing or remedying of such defect or peril was his principal duty. All stipulations, contracts or agreements between an employee and his employer or between other persons, contrary to the provisions hereof shall be null and void."

This section codifies the general common law rule placing a duty upon the master to furnish a reasonably safe place in which to work and reasonably safe appliances with which to work, but it also abolishes the defense of assumed risk.

4. Title 14—Protection and Regulation of Labor, ch. 76, Factory Inspection, Sec. 4313 to 4324. A Department of Factory Inspection is set up to administer the terms of this Act. **Sec. 4315** (as amended in Session Laws of Colorado, 1929—p. 340):

"That any person, firm, corporation or association operating a factory, mill, workshop, bakery, laundry, store, hotel, school house, theatre, moving picture house or place of public assemblage, or any kind of an establishment wherein laborers are employed, or machinery used and manual labor is

exercised by the way of trade for the purpose of gain within an enclosed room (private houses in which the employees live excepted) shall be provided in each workroom thereof with good, sufficient ventilation and kept in a clean sanitary state, and shall be so ventilated as to render harmless, so far as practicable, all gases, vapors, dust or other impurities, generated in the course of the manufacturing or laboring process carried on therein; and if any factory, mill, workshop, bakery, laundry, store, hotel, school house, theatre, moving picture house, place of public assemblage or any kind of an establishment wherein laborers are employed or machinery used in any enclosed rooms thereof by which dust is generated and inhaled to an injurious extent by the persons employed therein, conveyors, receptacles or exhaust fans, or other mechanical means shall be provided and maintained for the purpose of carrying off or receiving and collecting such dust." (Bold face type ours)

Sec. 4323:

"In all actions brought to recover damages for personal injuries or death caused by reason of the violation of any of the provisions of this act, it shall be sufficient for the plaintiff to prove in the first instance, in order to establish the liability of the defendant, that the death or injury complained of resulted in consequence of the failure of the person owning or operating the manufacturing establishment where such death or injury occurred to provide said establishment with safeguards as required by this act, or that the failure to provide such safeguard is directly contributed to such death or injury."
* * * (Bold face type ours)

Sec. 4315 makes it the duty of the employer to so ventilate his establishment as to render harmless, as far as practicable, dust generated in the course of work, while Sec. 4323 sets up a right of action for a breach of duty. In the absence of applicability of the Workmen's Compensation Act, failure to comply with this statutory requirement would seem to constitute negligence per se, which would be the basis of recovery for disability resulting from inhalation of such dust.

5. Title 14—Protection and Regulation of Labor, ch. 79, Industrial Commission, Secs. 4325 to 4374.

Sec. 4335:

"It shall also be the duty of the Commission, and it shall have the power, jurisdiction and authority:
* * *
"(b) To inquire into and supervise the enforcement, as far as respects relations between employer and employee, of the laws relating to child labor,

laundries, stores, factory inspection, employment of females, employment offices and bureaus, mining, both coal and metalliferous, fire escapes and means of egress from places of employment and all other laws protecting the life, health and safety of employees in employments and places of employment.

"(c) To investigate, ascertain, declare and prescribe safety devices, safeguards or other means or methods of protection best adapted to render safe the employees of every employment and place of employment, as may be required by law.

"(d) To ascertain and fix such reasonable standards and to prescribe, modify and enforce such reasonable orders for the adoption of safety devices, safeguards and other means or methods of protection to be as nearly uniform as possible, as may be necessary to carry out all laws relative to the protection of the life, health, safety and welfare of employees in employments and places of employment."
* * *

"(k) To administer and enforce all the provisions of law relating to compensation for accidental injury to and death of employees."

To the date of this report, the Industrial Commission had not adopted rules or regulations or prescribed standards under this section.

III. Common Law.

No decisions have been found which directly decide whether or not there can be a recovery at common law for disability resulting from an occupational disease caused by the inhalation of dust. It is assumed that the usual common law rule prevails and that the employee would have a recovery against the employer upon proof of negligence on the part of the employer.

Question arises as to the effect upon the common law liability of Secs. 13, 15, and 19 of the Workmen's Compensation Act. Sec. 13 provides:

"Any employer who has elected to and has complied with the provisions of this Act, including the provisions relating to insurance, shall not be subject to the provisions of Section 12 of this Act: nor shall such employer be subject to any other liability whatsoever for the death of or personal injury to any employee, except as in this Act provided; and all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common law rights and remedies for and on account of such death of, or personal injury to any such employee and accruing to any and all persons whomsoever, are hereby abolished except as in this Act provided."

Sec. 15 provides in part:

"The right to the compensation provided for in this Act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, on and after August 1st, 1915, shall obtain in all cases where the following conditions occur: * * *"
Here follow conditions which are immaterial for the purposes of this discussion.

Sec. 19 provides:

"Such election and compliance with the provisions of this Act, including the provisions for insurance, shall be, and be construed to be, a surrender by the employer and the employee of their rights to any other method, form or amount of compensation or determination thereof, or to any cause of action, action at law, suit in equity or statutory or common law right or remedy or proceeding whatever for or on account of such personal injuries or death of such employee than as provided in this Act, and shall be an acceptance of all of the provisions of this Act, and shall bind the employee himself, and for compensation for his death, shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency."

Inasmuch as occupational disease is not compensable under the Act, it would not seem logical that compliance with the Act by the employer should result in the employee being barred from a common law right of action for occupational disease. Although we do not find that this specific question has been passed upon by the Colorado courts, it has been held in a number of cases that the Workmen's Compensation Act is remedial, beneficent in purpose, and should be liberally construed; that all portions thereof should be read together and harmonized if possible; and that the beneficent purposes intended should be effected by liberal construction. See:

Karoly v. Industrial Commission,
65 Colo. 239, 176 P. 284 (1918);
Danielson, et al., v. Industrial Commission,
96 Colo. 522, 44 P. (2d) 1011 (1935);
McBride v. Industrial Commission,
97 Colo. 166, 49 P. (2d) 385 (1935).

Applying these rules of construction, it is our judgment that a common law right of recovery for occupational disease continues to exist notwithstanding the sweeping language of Secs. 13, 15, and 19 of the Act.

IV. Statutes of Limitations.

Sec. 4170 (1933, ch. 79) provides that an action for damages resulting from personal injury received in the course of employment must be brought within two years of injury, or, if death ensues, within two years of the death.

CHAPTER IX CONNECTICUT

Workmen's Compensation.

1. Statutes. General Statutes of Connecticut, Revision of 1930, ch. 280, Secs. 5223-5291.

2. Administration. The law is administered by the Workmen's Compensation Commission, composed of five commissioners, one from each congressional district, who are appointed by the governor. Inquiries may be addressed to the Commission at Hartford, Connecticut.

3. Scope of the Act. Sec. 5223 contains the following definitions:

"The words 'personal injury' or 'injury' * * * include only accidental injury which may be definitely located as to the time when and the place where the accident occurred, and occupational disease as herein defined. * * *" (Bold face type ours)

"Occupational disease" is defined to mean:

"* * * a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such. * * *"

The words "arising out of and in the course of his employment" mean:

"* * * an accidental injury happening to an employee or an occupational disease of such employee originating while he shall have been engaged in the line of his duty in the business or affairs of the employer upon the employer's premises, or while so engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer. * * *"

Due to the amendment of this section in 1917, to substantially its present form, disability from occupational diseases caused by the inhalation of dust is expressly covered by the Workmen's Compensation Law of this state.

Attention is here called to a brief statement of relevant sections of the Act:

1. The Act is divided into part A "Employers' Liability" (Secs. 5223 to 5225) and part B "Workmen's Compensation" (Secs. 5226 to 5291), and covers all public and private employments in the state. However certain employees are excluded: outworkers, casual employees, and members of the employer's

family dwelling in his house. The latter exception is qualified so that no exclusion is made where, in any contract of insurance, such person's salary is included in the pay-roll on which the premium is based.

Part A provides, at Sec. 5224, that, in actions to recover damage for personal injury or death sustained by an employee arising out of and in the course of his employment or from death resulting from an injury so sustained, the defenses of contributory negligence, negligence of fellow employee, and assumption of risk are abolished, except where suit is brought by the employee of an employer having regularly less than five employees, by casual employees, or by outworkers. Also, where part B of the Act has been accepted, such defenses have no application. (Sec. 5225.)

Part B provides for compensation without regard to negligence, except that wilful and serious misconduct of the injured employee or his intoxication will bar any recovery. Both employee and employer are conclusively presumed to accept part B, except employers having regularly less than five employees; however, such employer can elect to bring himself under part B. There are provisions for changing elections; but, upon an employee's electing not to be subject to part B in an action at law for injury or death, the defenses before enumerated become available to the employer; and, when the employer does not accept part B, these defenses are lost to him.

2. In the event of death, the compensation to be paid dependents is \$200.00 for funeral expenses, plus not more than \$21.00 or less than \$5.00 weekly for a period not longer than 312 weeks after death, depending on the average weekly earnings of the deceased at the time of the injury and the length of life of the dependents of the deceased (Sec. 5224). The compensation for both total and partial incapacity is from \$5.00 to \$21.00 weekly for not longer than 520 weeks (Sec. 5236-5237).

3. A written notice of claim for compensation must be given within one year from the date of the accident or the first manifestation of a symptom of occupational disease, but where death results within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent may make claim within a two-year period thereafter, provided that no claim on account of an occupational disease shall be made by an employee or his dependents against the employer in whose employ the disease is claimed to have originated, except while the employee is still in such employment or within three years after his leaving such employ-

ment. Want of notice is not a bar to a proceeding if there has been a hearing or a written request for a hearing or for an assignment of a hearing within one year from the date of the accident or from the first manifestation of an occupational disease, as the case may be, or if a voluntary agreement shall have been submitted within said period of one year, or if within said year the employee shall have been furnished, for the injury which is the basis of the claim, medical or surgical care as provided by the Act. Also, in no case shall any defect or inaccuracy in the notice of claim be a bar unless the employer shall show ignorance of the injury and resulting prejudice from such lack of notice; if such be shown, allowance will be made to the extent of such prejudice. (Sec. 5245).

4. With the approval of the State Insurance Commissioner, employer and employee may provide a system of compensation, benefit and insurance in lieu of that provided by the Act. Such is subject to the constant observance of the State Insurance Commissioner, with the provision that the latter can withdraw his approval at any time subject to reasonable notice, plus a right of appeal. (Sec. 5245). Otherwise any employer subject to part B who does not furnish to the Compensation Commissioner satisfactory proof of his ability to pay directly must insure his full liability under part B by filing with the Insurance Commissioner, in suitable form, security guaranteeing performance of the obligation under this Act, by insuring his full liability in an authorized stock or mutual company or association, or by such combination of these two as are selected by him and approved by the Insurance Commissioner (Sec. 5255).

If an employer has accepted part B and has failed to conform to Sec. 5255, the employee may elect to claim a right to compensation under part B or bring suit under part A. If the employer be a corporation, such action may be brought against any or all directors of such corporation who shall be individually and jointly and severally liable for such damage. If death results, such election may be made by those persons entitled to compensation, but on their failure to agree, the Commissioner shall make a final decision. The option to bring suit under part A is exercised by notifying the employer within six months after receiving the injury, and bringing the action within one year of the date of the injury. If the employer is not so notified, there remains only the right to compensation under part B. If an employer accepts part B and afterwards fails to conform to any provision of part B, he is liable to a fine of not more than \$100.00 for each failure.

4. Court Construction.

A. Construction of "Occupational Disease."

In *Dupre v. Atlantic Refining Co.*, 98 Conn. 652, 120 A. 268 (1923), the arduous character of decedent's work injured him by producing a condition of weakened resistance to an infection of the respiratory tract. This weakened condition of the lungs was held to be the proximate cause of pneumonia, causing death.

In granting compensation, the Court held that it was no bar to a recovery, that the injury could not be traced to a definite abnormal condition capable of being located in point of time and place.

In *Kobalski v. Collins Co.*, 128 A. 288 (1925), the plaintiff employed as a tool grinder, developed pneumoconiosis. In accord with a previous case, the Court held that the weakened condition caused by the employment was compensable under the Act and that the final disease caused by that weakened condition was also compensable.

In *Dombrowski v. Jennings & Griffen Co.*, 131 A. 745 (1926), plaintiff worked for the defendant as a steel grinder for eighteen years. That he was suffering from pneumoconiosis was first discovered in 1923, but the Commission found that it probably had been in existence a considerable time before that date. As a result of this disease lowering the plaintiff's resistance, pulmonary tuberculosis developed, which totally incapacitated the plaintiff sometime before April of 1924. Full compensation was awarded. Defendant contended that the plaintiff should be awarded compensation only for the aggravation of a pre-existing occupational disease, as occupational diseases were not compensable until the amendment of 1919. This contention was not successful, the Court holding that aggravation does not entitle the employer to a diminution of compensation where there is only a pre-existing tendency to the disease or a pre-existing condition of employment tending to produce a disease, and also that the employer had the burden of proving matter to diminish compensation.

In *Madore v. New Departure Mfg. Co.*, 104 Conn. 709, 134 A. 259 (1926), plaintiff had tuberculosis prior to his employment. He worked for nearly two years in a grinding room where blowers had been installed to take away the dust, and the manual labor required of plaintiff was neither heavy nor laborious. The Court held that his present total disability was not compensable, as any employment as a grinder would have produced a result similar to that produced in this case and since

the pre-existing tuberculosis was not aggravated in any way other than as a similar amount of exertion or bodily exercise would have aggravated it. Plaintiff's present condition was the natural development of the pre-existing disease.

In *Masite v. International Silver Co.*, 134 A. 264 (1926), the plaintiff worked for a period of eighteen years for defendant as a sand buffer, during which period the inhalation of sand particles weakened the resistance of his lungs and rendered them more likely to infection. Shortly before being forced to quit work, the deceased began to suffer from pulmonary tuberculosis. Compensation was granted on the ground that conditions under which the deceased worked were a direct and proximate cause of the tuberculosis.

To the same effect, see the following:

Clahowski v. Clayton Mfg. Co.,

136 A. 472 (1927);

Romaniec v. Collins Co.,

107 Conn. 63, 139 A. 503 (1927).

A very enlightening analysis of the definition of "occupational disease" as used in Sec. 5223 of the statutes is found in *Glodenis v. Larkin Brass Co.*, 170 A. 146 (1934). The plaintiff was wholly incapacitated by reason of lead poisoning resulting from his employment by defendant as a caster in its factory. In reviewing the Commission's award of compensation, the Court said:

"* * * This definition does not require that a disease, to be within the definition, should be one which arises solely out of the particular kind of employment in which the employee is engaged, nor that it should be due to causes in excess of the ordinary hazards of that particular kind of employment. Otherwise the definition would exclude most diseases; lead poisoning, for example, is not an ordinary incident of employment in general, but arises particularly out of those processes in which lead is used and occurs in a number of kinds of employment, but for that reason it is not held to be outside the definition. The phrase, 'peculiar to the occupation,' is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations (see Oxford Dictionary; Funk & Wagnall's Dictionary); and the phrase 'employment as such' means employment in general. To come within the

definition, an occupational disease must be a disease which is a natural incident of a particular occupation, and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of that attending employment in general. * * *

B. Limitations of Time as to Notice and Suit.

The statutes which specify the time within which claims must be filed and actions must be brought have undergone such change in Connecticut that care must be exercised in considering cases to relate them to the statutes then in force, and to differentiate later cases based upon more recent statutes. Prior to 1929, the statutes provided that no proceeding for compensation could be maintained

"unless a written notice of claim * * * is made within one year from the date of the injury * * *."

This statute was so construed that compensation was allowed where the claims were filed within one year after total disability although the disease had been discovered and was known to exist for much more than a year prior to the filing of a claim. See:

Exposito v. Martin-Rockwell Corp.,
96 Conn. 414, 114 A. 92 (1921);
Rousu v. Collins Co.,
157 A. 264 (1931);
Michna v. Collins Co.,
164 A. 502 (1933).

By amendment effective August 6, 1929, Sec. 5245 of the General Statutes was so amended to include the following:

"No proceedings for compensation * * * shall be maintained unless a written notice of claim * * * shall be given within one year from the date of the accident or from the first manifestation of a symptom of the occupational disease * * *"

Following this amendment, the Court decided *Farmer v. Bieber-Goodman Corp.* and *Mockovak v. McLachlan Hat Co.*, (decided in one opinion) 172 A. 95 (1934). The claimants were suffering from incapacity resulting from mercurial poisoning arising out of their employment in the hat industry. In each case, more than one year had passed since the first manifestation of the disease, but not since the time when each was incapacitated for work. The Court reviewed the change in the law with respect to notice, and held that the giving of notice

within one year from the first manifestation of a symptom is a condition precedent to recovery.

In denying compensation, the Court said:

"* * * While in such a situation the employee would have no immediate claim for compensation, there is nothing in the act which prevents him from giving notice to the employer, within one year from the first manifestation of a symptom of the disease, that he would demand compensation should he be thereafter incapacitated by reason of the disease. Notice so given would enable the employee to secure compensation, should incapacity ultimately result, and give to the employer the protection which the statute contemplates."

Sec. 5245 was again under consideration in the case of *Bremer v. Marc Edlitz & Son*, 174 A. 172 (1934), and the Court struggled with the question as to what should be considered the first manifestation of a symptom of the occupational disease. Bremer was employed by the defendant as a stonecutter since 1928. On January 3, 1931, he consulted a doctor because of a cold and coughing. The doctor found indications of pneumonitis and prescribed medicine, which, by January 17, 1931, had caused the cough to disappear, and Bremer gained weight. The clinic at that time did not believe he had active tuberculosis and released him.

On March 19, 1932, Bremer again returned with a cold and cough, but no change in his chest condition was observed, except signs of chronic bronchitis. On April 29, 1932, Bremer quit work and was never able to return. No written claim of compensation was filed until March 15, 1933.

The Commission found that the first manifestation of a symptom of silicosis was in January of 1931, when he had a cold, cough, and signs of shortness of breath. They thereupon dismissed the case. On appeal, it was reversed and remanded. The Court, in its opinion, said:

"* * * No doubt the legislators used the word manifestation with something of this significance, intending that the duty of giving notice, and the risk that an employee might forfeit compensation for an occupational disease, should arise only when a symptom of that disease should plainly appear, not when it was merely suspected or doubtful. Beyond this the word in its use in the provision in question implies two things. One is that the duty to give the notice is not conditioned upon actual knowledge, but upon the fact that the symptom of the disease mani-

fects itself; an employee cannot close his understanding to that which is clear and plain, and if the circumstances are such that a reasonable man would clearly recognize the existence of a symptom of an occupational disease, it must be regarded as manifest in the sense of the statute; for in the law it is usually so that what a man ought to know he is conclusively deemed to know. (Citing cases) The other implication arising out of the phrase in question is that there must be a clear recognition of the symptom as being that of the occupational disease in question; however plain is the presence of the symptom itself, unless its relation to the particular disease also clearly appears, there cannot be said to be a manifestation of a symptom of that disease.

"* * *

"* * * The Legislature clearly must have intended that the manifestation should be to the employee or some one standing in such a relation to him that the knowledge of such a person would be imputed to him, and be such as is or ought to be recognized by him as symptomatic of an occupational disease."

Apparently because of the difficulty of construction, as evidenced by the above case, the Legislature again amended Sec. 5245, effective July 1, 1935, by adding thereto the following:

"For the purposes of this section, 'manifestation of a symptom' shall be deemed to mean its manifestation to the employee claiming compensation, or to some other person standing in such relation to him that the knowledge of such a person would be imputed to him, in such manner as is or ought to be recognized by him as symptomatic of the occupational disease for which compensation is claimed."

II. Other Statutes.

Recovery for injuries suffered through exposure to dust is had under the Workmen's Compensation Act, which is administered by the Workmen's Compensation Commission. Regulation of industry, in order to eliminate such hazards, is under the joint jurisdiction of the Department of Labor and Factory Inspection and the State Department of Health, acting through its Bureau of Occupational Diseases.

1. **Department of Labor and Factory Inspection.** Headquarters: 257 State Office Building, Hartford, Connecticut. Administered by the Commissioner of Labor and Factory Inspection, who is appointed by the governor for a four-year term (Sec. 2338). The Commissioner is assisted by seventeen deputy

inspectors (Sec. 2351).

A complete copy of the labor laws of this state is published in pamphlet form by the Commissioner and can be procured upon request.

Among the statutes which are administered by this Department are the following:

Sec. 2355 provides:

"All factories and buildings where machinery is used shall be well lighted, ventilated and kept as clean as the nature of the business will permit."

Sec. 2359 relates specifically to precautions against dust, and provides as follows:

"Each employer whose business shall require the operation or use of any emery, tripoli, rouge, corundum, stone, carborundum or other abrasive, polishing or buffing wheel, in the manufacture of articles of metal or iridium or whose business shall include any process which generates an excessive amount of dust, shall install and maintain in connection therewith such devices as may be considered necessary by the commissioner and the state department of health to remove from the atmosphere any dust created by such process. The commissioner, with the state department of health, shall issue to any employer engaged in such business any order necessary to render effective the foregoing provision, and if, within sixty days from the issuance of such order stating the changes to be made, such order shall not be complied with, the commissioner may order any such department closed until such order shall be complied with. Any person who shall violate any provision of this section or fail to comply with any written order issued in accordance therewith within sixty days thereafter shall be fined not more than five hundred dollars for each offense. Such orders shall be enforceable by the superior court, or by a judge thereof if said court is not in session, by injunction on application of the commissioner or of the state department of health."

In addition to being subjected to penalties for failure to comply with orders of the Department of Labor and Factory Inspection, the employer so failing to comply would be faced with great difficulty in defending an action, as the courts would probably hold such failure to constitute negligence per se.

2. **State Department of Health.** As noted above, the State Department of Health collaborates with the Commissioner of Labor and Factory Inspection to administer Sec. 2359 above

quoted.

The Department of Health, however, has distinct and specific duties to perform with respect to occupational disease. By Sec. 2423, every physician in the state is required to mail to the State Department of Health a detailed report whenever he acquires knowledge of any person whom he believes to be suffering from poisoning from lead, phosphorus, arsenic, brass, wood alcohol or mercury or their compounds, or from anthrax, or from compressed-air illness or any other disease, contracted as a result of the nature of the employment of such person.

The same section then authorizes the State Department of Health to investigate and make recommendations for the elimination or prevention of occupational diseases which are so reported to it. The Department is authorized to study and provide advice in regard to conditions that may be suspected of causing occupational diseases. It is provided that none of the reports by physicians nor the information obtained by the Department shall be admissible as evidence in any action at law or under the Workmen's Compensation Act.

The Bureau of Occupational Diseases of the State Department of Health has made surveys and studies of working environments in which potential dust hazards exist, and has made recommendations for control of dust hazards in some instances. Reports of typical studies appear in the annual reports of the State Department of Health.

The Bureau of Occupational Diseases purports to include among its major activities the following:

1. It secures and investigates reports of occupational diseases from physicians.
2. It provides consultation service and a source of information for physicians, industry, and labor with respect to treatment and prevention of occupational disease.
3. It makes surveys and field studies of work-room environment.
4. It maintains a laboratory for analysis of samples collected in fields of studies.
5. It renders reports of its findings to industry and makes recommendations predicated on the results of field surveys and studies for the control of occupational disease.
6. It provides literature on occupational disease subjects.

3. **Employers' Liability.** General Statutes, Sec. 5211. The common law duty of the employer to provide a safe place to work and safe instrumentalities with which to work is declared

by this section in the following language:

"It shall be the duty of the master to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and to fit and competent persons as his co-laborers, and to exercise reasonable care in the appointment or designation of a vice-principal and to appoint as such vice-principal a fit and competent person. The default of a vice-principal in the performance of any duty imposed by law on the master shall be default of the master."

Undoubtedly, under the foregoing section, a safe place to work means a place reasonably free of harmful dust.

III. Common Law Liability.

Because of one statement made by the Court in *Miller v. American Steel & Wire Co.*, 90 Conn. 349, 97 A. 345 (1916), there is some doubt as to whether a common law right of action to recover for occupational disease exists in Connecticut. The plaintiff contracted lead poisoning by working in and about a room where molten lead and fumes arising from molten lead were present, and was allowed compensation by the Commission. The question before the Court was whether the Workmen's Compensation Act (before the 1919 amendment) covered occupational diseases. The Court reversed the Commission and denied compensation on the ground that occupational diseases were not covered. Although the right to recover at common law was not in issue, the Court made the following comment:

"Since the common law action for damages, which was founded on the master's negligence, never attempted to cover the typical case of an occupational disease caused by continued exposure to the ordinary and known risks of the employment, the inference is plain that the alternative compensation scheme was not intended to cover such diseases."

This was an obiter statement, but sufficient to create some uncertainty as to what the court would hold if the issue were clearly raised. It is manifest that the court, in making this statement, was thinking of occupational diseases in the narrow sense, i. e., of diseases which could not have been prevented by any amount of care on the part of either the employer or the employee, and not diseases which are peculiar to a certain occupation, and which are sufficiently well recognized that precautions can be exercised to prevent their occurrence.

If the court should adopt such definition, recovery would be impossible under the common law. The discussion in the opinion of the dissenting judge, at 97 A. 354, recognizes the distinction between occupational disease which results from negligence and that which no reasonable amount of care can avoid. The dissenting judge says, in part:

"Assuming the negligent causing of disease to an employee without his concurring fault, our common law gives a remedy, and in this our law does not differ from the common law of other jurisdictions."

"In the case of *O'Keefe v. National Folding Box & Paper Company*, 66 Conn. 38, 45, 33 Atl. 587, an attempt was made by the plaintiff to recover for an injury resulting from the vaporization of poison from the paper he was handling entering his system. Clearly this was an occupational disease. We held that the complaint was defective in its statement of the cause of action, but we recognized the existence of such a cause of action when properly stated as is shown on page 45 of 66 Conn. (33 Atl. 587). The instances where this precise point has been determined are comparatively infrequent, and this is probably due to the fact that the employee's recovery was barred by his assumption of the risk. We know of no case holding with the *Michigan* case that injury through disease due to fault to which the sufferer has not materially contributed is remediless under the common law. Examples of a contrary holding are *Hurle's Case*, 217 Mass., supra, and cases cited; (Citing cases)."
(Bold face type ours)

In regard to the statement set out above in the majority opinion as to the lack of a common law recovery, the dissenting judge said:

"Again, I prefer to think this is an inadvertence in the argument, for it assumes that the Compensation Act was a substitute for the common-law action for damage suffered through a master's negligence. And the contrary is elementary in the consideration of a compensation act. And this court has so decided."

This position taken in the dissenting opinion is the more common one taken by the courts, and there is strong reason to believe that the Connecticut courts will so hold when such a case is presented to them.

It should be clearly understood that, since 1919, occupational disease, as hereinbefore defined, is compensable under the Workmen's Compensation Act of this state. Because of the

peculiar wording of various sections of the Workmen's Compensation Act, it is extremely difficult to determine to what extent the provisions for compensation supersede the common law rights of the employee with respect to occupational disease. "Personal injury" is defined in Sec. 5223 in such manner as to exclude occupational disease, and then "occupational disease" is defined as "a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such." In Sec. 5226 (Workmen's Compensation Act), it is provided that, where the employer and employee have accepted the provisions of that Act, "the employer shall not be liable to any action for damages on account of personal injury * * * or on account of death resulting from personal injury. * * *" It is also provided in that section that the acceptance of the Workmen's Compensation Act by the employers and employees will be understood as mutual renunciation and waiver of all rights and claims arising out of personal injury sustained in the course of the employment. Inasmuch as "occupational disease" is not mentioned in Sec. 5226, it would seem that the exclusiveness of the remedy to recovery under the Workmen's Compensation Act is confined to recovery arising out of personal injury, and not arising out of occupational disease. This construction would result in the employee having the option at all times to elect between filing a claim for compensation and filing an action at common law (assuming that a common law right of action for occupational disease disability exists, and we believe it does).

Ily Sec. 5224 of the Workmen's Compensation Act, which section is included in part A dealing with Employers' Liability, the employer is denied the common law defenses of contributory negligence, fellow servant, and assumed risk in any action to recover damages for personal injury. Here again the definition of "personal injury" would exclude occupational disease, and the result would be that this section does not deny the employer the common law defenses if the action is brought to recover for occupational disease.

In Sec. 5229, it is provided that the employer, in accepting the Workmen's Compensation Act, shall be liable for damages on account of personal injury and shall be denied the common law defenses, and further that, if the employer accepts the Act and the employee rejects it, the employer shall not be denied the common law defenses. Here again this section is, by definition, limited to actions growing out of personal injury and does not apply to actions growing out of occupational disease

disability.

Our conclusion is that the employee may at any time elect to bring a common law action to recover for occupational disease, notwithstanding the Workmen's Compensation Act, and that in such action the employer may take advantage of all common law defenses.

IV. Miscellaneous Matters of Interest.

Statute of Limitations.

With respect to actions at common law, Secs. 1680C and 3987 provide that action for personal injury or death must be brought within one year from the date of the act or omission complained of.

CHAPTER X DELAWARE

1. Workmen's Compensation.

1. **Statutes.** Revised Code of Delaware, ch. 90, Article 5, Secs. 3193a to 3193gg inclusive. These are also referred to as Secs. 94 to 152 inclusive of the Delaware Workmen's Compensation Law of 1917 and subsequent revisions.

2. **Administration.** The law is administered by the Industrial Accident Board, consisting of three members appointed by the governor for terms of six years each. The Board's principal office is in the Delaware Trust Building, Wilmington, Delaware, and it maintains a branch office in the State House at Dover, Delaware.

3. **Scope of the Act.** By Sec. 3193d, it is provided that every employer and every employee is bound by the Act " * * * to pay and to accept compensation for personal injury or death by accident arising out of and in the course of the employment, regardless of the question of negligence, and to the exclusion of all other rights and remedies, * * * " unless there is a definite election made in the manner specified not to be bound by the Act.

Sec. 3193rr contains the following definition:

"The terms 'injury' and 'personal injury' * * * shall be construed to mean only violence to the physical structure of the body and such disease or infection as naturally results directly therefrom when reasonably treated; and whenever death is mentioned as a cause for compensation * * * it shall mean only death resulting from such violence and its resultant effect when reasonably treated as aforesaid, and occurring within two hundred and eighty-five weeks after the accident."

Occupational disease is therefore not covered by the Workmen's Compensation Law of this state.

4. **Court Construction.** That occupational disease as such is not covered by the Act is established by the case of Hendrickson v. Continental Fibre Co., 136 A. 375 (Superior Court, 1926). In this case, the Court said in part:

" * * * We are holding, under the facts of this case, that a slow, gradual, idiopathic disease unaccompanied by and unrelated to any injury by accident, as we have construed such terms, is not embraced within the terms of our Workmen's Compensation Law."

NOTE: See further discussion of this case under "Common Law Liability."

II. Other Statutes.

Child Labor Laws. In Ch. 232 it is provided that no child under fifteen (15) years of age may work in certain industries, including processes in which dangerous acids are used, the manufacturing or packing of paints, colors, or white or red lead, the manufacturing of compositions with dangerous gases, or in tunnels or excavations, or in connection with any mine, quarry, coal breaker, or oven.

There appear to be no general statutes prescribing safety devices or measures to be taken to protect against the hazards of inhaling air polluted by gas, dust or other substances.

III. Common Law Liability.

We find no cases denying the right of an employee to recovery for occupational disease resulting from negligence of the employer. That such common law right exists in this state is indicated by the case of *Hendrickson v. Continental Fibre Co.*, 136 A. 375 (Superior Court, 1926), which was a common law action to recover damages for a diseased condition contracted by the plaintiff over a period of six months. The physical condition complained of was optic neuritis, atrophy of the optic nerve, and neuritis and atrophy of the olfactory and gustatory nerves resulting in loss of sight, sense of smell, and taste. It was alleged that the disease was the gradual and cumulative effect of chemicals used in manufacturing fibre tubes; that the plaintiff was unfamiliar with the danger; and that the employer negligently exposed the employee to the danger. Upon demurrer to this petition, it was held to state a good cause of action at common law.

When the above decision was rendered, three judges were sitting. The opinion was rendered by Judge Rodney.

This case later came on for trial and is reported again as *Hendrickson v. Continental Fibre Co.*, 140 A. 659 (Superior Court, 1927). The second report sets forth in full the charge to the jury given by Chief Justice Pennewill. This charge may well be read for a painstaking statement of the obligation resting upon the employer to furnish a safe place to work and also of the manner in which the rights of the employee are affected by his own conduct. Within the limits of this report, we can only state that the charge recognizes the common law obligation on the part of the employer to furnish a safe place and safe instrumentalities. It also recognizes the common law de-

fenses of assumed risk and contributory negligence.

Based upon the foregoing decisions, it would appear that the common law rights and liabilities exist in this state with respect to occupational disease.

IV. Miscellaneous Matters of Interest.

1. **Statute of Limitations.** By Sec. 4675 of the Revised Code of Delaware, it is provided that an action for damages for personal injury shall be brought within one year from the date upon which it is claimed such injury was sustained. It is an open question as to when this year would begin to run where occupational disease is involved.

2. At the time of the writing of this report, there is no pending legislation relating to dust hazards or silicosis.

Some study of these subjects has been made by the Delaware Safety Council, located in the Du Pont Building, Wilmington, Delaware, to which inquiries may be addressed.

CHAPTER XI DISTRICT OF COLUMBIA

I. Workmen's Compensation.

1. Statutes. The original Compensation Act was entitled and is known as "Longshoremen's and Harbor Workers' Compensation Act." It was approved March 4, 1927, and its liability provisions became effective July 1, 1927. This Act is now cited as U.S.C.A., Title 33, ch. 18, Secs. 901-950. References herein will be made to the section numbers of the original Act, and the U.S.C.A. sections will follow in parentheses.

By Act of Congress approved May 17, 1928, and effective July 1, 1928, it is provided that the provisions of the Longshoremen's and Harbor Workers' Compensation Act shall apply

"* * * in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person."

There are four exceptions which are not material in this discussion. This Act of May 17, 1928, is quoted in full in the note under Sec. 901, ch. 18, Title 33, U.S.C.A.

2. Administration. Both of the foregoing Acts are administered by the United States Employees' Compensation Commission. The office of the Deputy Commissioner in charge is at 805 G Street, N. W., Washington, D. C.

3. Scope of the Act. The Longshoremen's and Harbor Workers' Compensation Act provides, in Sec. 3 (a) (U.S.C.A., Title 33, Sec. 903):

"Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

The Act of May, 1928, cited above, and which may be referred to as the "Workmen's Compensation Law of the District of Columbia," extends the scope of the Longshoremen's

and Harbor Workers' Act to all employments within the District of Columbia. The result is that all employments within the District of Columbia are covered by the Act (with certain immaterial exceptions), and outside the District of Columbia the Act covers all employments upon navigable waters, including dry dock.

Occupational disease is specifically covered by the Act and is compensable under the Act, as will be noted from the following quotations:

Sec. 2 (2) (U.S.C.A., Title 33, Sec. 902) provides:

"The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

Exclusiveness of the Act.

Sec. 5 (U.S.C.A., Title 33, Sec. 905) provides that the liability of the employer prescribed in the Act "shall be exclusive and in place of all other liability of such employer," except that, if the employer fails to secure payment of compensation as required by the Act, the injured employee, or his legal representative in case of death, may elect whether to claim compensation or to maintain an action at law or in admiralty for such damages. Under such circumstances, if the employee elects to bring an action for damages, the employer is denied the defenses of fellow servant, assumed risk, and contributory negligence.

Compensation runs up to a maximum of 66 2/3% of the average weekly wages during total disability; in case of death, a maximum of 66 2/3% of the average weekly wages for certain periods, depending upon conditions; and the outside limitation of recovery, under any circumstances, is a maximum of \$7,500.00.

The Act is compulsory with respect to the employer. He may procure insurance in some authorized company or association, and has the alternative of carrying his own risk upon proof of financial responsibility.

4. Court Construction. The right to compensation has been upheld in case of:

Infection—*Todd Dry Dock Co. v. Marshall*, 49 F. (2d) 621 (1931).

Pneumonia—*Goble v. Clark*, 56 F. (2d) 170 (1931).

Pertussis—*Travelers Insurance Co. v. Locke*, 56 F. (2d) 860 (1930).

Aggravation of bronchiectasis resulting from inhaling dust while shoveling copper ore—*Lea Mathew Corp. v. U. S.*, 56 F. (2d) 860 (1930).

Exposure to sulphur dioxide gas—*National Casualty Co. v. Hoage*, 73 F. (2d) 850 (1934).

In *Commercial Casualty Insurance Co. v. Hoage*, 75 F. (2d) 677 (1935), compensation was allowed under the Act for the death of Charles Theodore, who was employed as a clerk in a grocery store. He was a man of middle age and was afflicted with a heart ailment of gradually increasing severity. While performing his usual duties December 26, 1931, of stacking 150-lb. sacks of potatoes, he suffered a severe heart attack, which incapacitated him from work thereafter, and he died January 1, 1933. The Court affirmed the finding of the Deputy Commissioner to the effect that lifting the sacks precipitated the condition which resulted fatally, and that he was entitled to compensation even though his heart was in a weakened condition due, perhaps, to an infection in his blood which had existed many years.

II. Other Statutes.

We find no other pertinent statutes.

III. Common Law Liability.

If a right to recover at common law for occupational disease existed in the District of Columbia prior to the enactment of the Workmen's Compensation Act, it still exists and is available to an injured employee, provided the employer failed to afford compensation under the Act. Although decisions involving occupational disease cannot be cited, it appears that the courts of the District of Columbia have always recognized the general principles of common law liability growing out of the failure to furnish a safe place for the employees to work or safe instrumentalities with which to work. In support of this conclusion, we would call attention to:

Birmingham v. Pettit,
21 D.C. 209 (1895)
Hayzel v. Columbia Ry. Co.,
19 App. D.C. 359 (1902)
Butler v. Frazee,
25 App. D.C. 302 (1905)
Gibson v. Geinat,
267 F. 305 (1920);

Green v. Pyne,
289 F. 929 (1923)
Decatur v. Tompkins Co.,
25 F. (2d) 526 (1928).

As a recognition by the federal courts of the common law rule with respect to furnishing a safe place to work, we call attention to but one case which is illustrative, to-wit:

Jacque v. Locke Insulator Corp.,
70 F. (2d) 680 (Second Circuit, 1934).

This was an action to recover damages for the death from silicosis of an employee due to negligence in failing to provide a safe place to work. A judgment in favor of the plaintiff for \$15,239.56 was affirmed. The Court said in part:

"* * * Irrespective, however, of any statute, there is a duty at common law to warn and instruct employees and furnish them with means to avoid inhaling elements that are poisonous or injurious to their health, and there was proof that silica dust is such an element. * * *"

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations.

Sec. 13 of the Longshoremen's Act requires claims to be filed within one year after injury or death with proper extension of time in case of legal disability.

Common law actions for personal injuries must be brought within three years (District of Columbia Code, Sec. 1265), and for death within one year from death (District of Columbia Code, Sec. 1302).

2. Pending Legislation.

There appears to be no prospect of new laws in the near future which will materially affect the District of Columbia.

NOTE: A congressional investigation of silicosis is now being conducted, and the Secretary of Labor is conducting conferences which may result in a draft of Federal Occupational Disease Compensation Law and an effort to have it adopted as a uniform act in the States.

CHAPTER XII FLORIDA

I. Workmen's Compensation.

1. **Statutes.** This Act, which is commonly known as "House Bill No. 29, Laws of Florida, Acts of 1935", was approved by the Governor in May, 1935. Its administrative provisions became effective May 25, 1935, and its liability provisions became effective July 1, 1935. References herein are to the section numbers of the Act.

2. **Administration.** The Act is administered by the Florida Industrial Commission, consisting of three members appointed by the governor, the offices of which are in the State Capitol Building, Tallahassee, Florida.

3. **Scope of the Act.** In Sec. 2, which is devoted to definitions of terms, it is provided in subparagraph (5) as follows:

"The term 'injury' means personal injury or death by accident arising out of and in the course of employment, and such diseases or infection as naturally or unavoidably results from such injury."

In subparagraph (19) of the same section, it is provided:

"'Accident' shall mean only an unexpected or unusual event, happening suddenly. * * * Where a pre-existing disease is accelerated or aggravated by an accident arising out of and in the course of the employment, only the acceleration of death or the acceleration or aggravation of disability reasonably attributable to the accident shall be compensable."

By virtue of these definitions, occupational disease is not compensable under this Act.

4. **Court Construction.** This Act is so new that we find no court constructions of it.

II. Other Statutes.

We find no general statutes with respect to dust hazards or with respect to causes of action which might arise out of inhaling polluted air.

Secs. 5934-5966 of the Florida Code deal with the general subject of master and servant.

Secs. 7058-7063 create or recognize rights of action against employers growing out of the operation of certain occupations designated as hazardous. These occupations are generally those connected with public transportation companies, and do not involve dust hazards.

Sec. 3160 of the Florida Code authorizes the State Board of

Health to make and enforce rules and regulations with respect to sanitation and disinfection of various places of employment, including factories. The purpose of this statute seems to be to suppress nuisances and to prevent the spread of communicable, contagious, or infectious diseases. It does not seem to be designed to cover operations involving dust hazards, but we cannot say with certainty that the Board of Health lacks jurisdiction to regulate such conditions.

III. Common Law Liability.

In the absence of decisions to the contrary, we assume that usual common law liability exists in Florida for injury, as well as disease caused by the employer's negligence, and that the employer may avail himself of the usual common law defenses, except to the extent that such rights are changed or denied by specific provisions of the Workmen's Compensation Act.

That Act provides that every employer and employee, unless otherwise specifically provided, shall be presumed to have accepted the provisions of the Act. An employer may, however, by giving notice to the employees, in the form prescribed by the statute, elect not to accept the Act and not to operate under it. If he does so elect not to operate under the Act, the employee may bring an action at law for damages and, in such case, the employer is denied the common law defenses.

Sec. 11 of the Workmen's Compensation Act provides:

"The liability of an employer prescribed in Section 10 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act an injured employee, or his legal representative, in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

It is not possible to predict what view the courts will take of the section last quoted above. There are two lines of decisions in other states: one which holds that the common law rights

of action against employers are completely barred even though the injury complained of is not compensable under the Act. The other line of decisions bars common law actions, only with respect to such types of injury as are compensable.

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations.

By Sec. 4663 of the Florida Code, it is provided: "An action arising upon account of an act causing a wrongful death" shall be commenced within two years—presumably from the date of the wrongful act, rather than the date of death. The same section provides: "An action upon a liability created by statute" shall be brought within three years. It is then provided that an action "for relief not specifically provided for" otherwise, shall be brought within four years.

2. No official survey has been made of dust hazards or silicosis in Florida. The state legislature is not now in session.

CHAPTER XIII

GEORGIA

I. Workmen's Compensation.

1. Statutes. Georgia Code of 1933, Sec. 114-101 through Sec. 114-9902, and Sec. 54-101 through Sec. 54-107.

2. Administration. The Act is administered by the Department of Industrial Relations under the control and management of three directors, the Chairman of whom is the Commissioner of Commerce and Labor. Communications may be addressed to the Department of Industrial Relations at Atlanta, Georgia.

3. Scope of the Act. By Sec. 114-102, "injury" or "personal injury" means "only injury by accident arising out of and in the course of employment and shall not include a disease in any form except where it results naturally and unavoidably from the accident. * * *"

Under this section, disability resulting from occupational diseases is excluded under the Act unless it results naturally and unavoidably from an accident.

4. Court Construction.

A. When Disease is Compensable.

If an injury is traceable to a definite time, place, and cause and disease results, the disease is compensable, as illustrated by three cases next following:

In *Employers' Liability Assurance Corp. v. Nerdwell*, 142 S. E. 182 (Court of Appeals, 1928), compensation was granted where an employee operating a sawmill died from traumatic pneumonia resulting from an injury received in his chest while handling logs in the course of his duties.

In *Metropolitan Casualty Ins. Co. v. Croushaw*, 161 S. E. 649 (Court of Appeals, 1931), death of an employee from a disease contracted by handling dead rabbits in the course of his employment while he had abrasions on his hands was held to be compensable as being a disease resulting naturally and unavoidably from an accident within the meaning of the act.

In *Maryland Casualty Co. v. Brown*, 173, S. E. 925 (Court of Appeals, 1934), claimant had acute lung trouble, which was the result of his being sent into a close tank to assist in the removal of rivets. He became overheated and breathed foul air and dust. That evening he became sick and a physician's examination disclosed injury to the tissues of his lungs and bron-

chial tubes and inability to get the breath quickly. His condition was held to be compensable under the Act.

That silicosis, though due to the negligence of the employer, is not compensable is established by the case of *Simmons v. Etowah Monument Co.*, 42 Ga. App. 633, 157 S. E. 260 (1931). The employee, in a closed room, operated an air hose through which sand was blown on marble, thereby creating considerable dust. Because of faulty construction and adjustment of the mask furnished him, which he was accustomed to wear, and insufficient ventilation of the room, he contracted silicosis. In denying compensation, the court said:

"The fact that the disease itself was contracted by accident, in the sense that its happening was unforeseen or unexpected, or in some careless or intentional manner in which the employee's work was performed, will not render the disease compensable, if it did not result from a previous injury or accident to the employee himself. * * * Since an 'injury' as defined in the Compensation Act, is 'an injury by accident', in the sense of some damage or hurt to the employee, the mere lodging of the particles of dust and sand in the defendant's lungs constituted in itself no injury or accident to the employee in the sense of the act; and the diseases of the lungs which resulted therefrom were not, for this reason, caused by any injury or accident to the employee."

B. Exclusiveness of the Act.

Sec. 103 of the Act provides:

"The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this Title, agreeing respectively to accept and pay compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

This is followed by a provision that nothing in the Act shall be construed to relieve any employer or employee from any penalty for failure or neglect to perform any statutory duties.

The question immediately arises as to whether the common law right of action to the employee is barred with respect to occupational disease or injury for which the Act provides no compensation. The decisions in this state seem clear that the employee has no right whatever to recover at common law,

provided the employer has accepted and complied with the provisions of the Workmen's Compensation Act. If a common law right of action existed before the enactment of this law for occupational disease contracted because of negligence of the employer, that right was lost when the Compensation Act became law.

In support of these conclusions, we call attention particularly to the following cases:

Webb v. Tubize-Chatillon Corp.,
45 Ga. App. 744, 165 S. E. 775 (1932).

This was an action at common law for injuries alleged to have been sustained by reason of the employer's negligence. Here the injury complained of was a condition of the employee's lungs caused by the inhalation of poisonous fumes, which the court admits is not compensable under the Act since it is not an injury by accident as contemplated therein.

A demurrer to the petition was upheld, the court saying:

"Where an employee has, as provided in the Workmen's Compensation Act, accepted the act, his rights against the employer to recover on account of any injuries sustained by reason of the employer's breach of any duty to the employee arising out of the relation between them, which was that of master and servant, are determinable solely under the provisions of the act, and, as expressly provided by the act, are not determinable at common law. This is true notwithstanding the injuries complained of did not result from an accident, and therefore the employee, although he had accepted the act could not recover compensation therefor.

"* * * since the right of an employee to recover for injuries sustained by him as a result of his employer's negligence in the performance of the latter's duties as a master is determinable either at common law or under the provisions of the Workmen's Compensation Act, depending upon whether the employee has accepted the provisions of the Workmen's Compensation Act as provided in the act and thereby excluded his right to recover at common law, * * *"

In *Maloney v. Kirby*, 172 S. E. 683 (Court of Appeals, 1934), the opinion reads:

"* * * The rights and remedies of an injured employee within the scope of the Workmen's Compensation Act are controlled by its provisions, it excludes all other rights and remedies * * * at com-

mon law or otherwise on account of such injury * * *.

In *Stebbens v. Georgia Veneer & Package Co.*, 179, S. E. 649 (Court of Appeals, 1935), it was held that the rights of an employee accepting the Workmen's Compensation Act to recover for injuries sustained by reason of the employer's breach of any duty owed the employee are determinable solely under the Act, notwithstanding the injuries complained of did not result from an accident, and are not compensable thereunder.

In view of the situation existing under the foregoing decisions, it is important to note that, by Sec. 201 of the Act, it is provided that every employer and employee shall be presumed to have accepted the provisions of the Act unless, prior to the date of an accident, notice to the contrary shall have been given in the manner provided in the Act.

If an employer elects not to operate under the Act, he may be sued at common law by an employee and he is then denied the common law defenses of contributory negligence, fellow servant, and assumed risk.

If the employee has elected not to come under the Act, but his employer is operating under the Act, the employee may still sue at common law, but in such event the employer may avail himself of the common law defenses. (Secs. 204, 205, and 206).

The exclusiveness of the Workmen's Compensation Act obtains only when the employer has accepted the provisions of the Act. If he does not accept the provisions of the Act, he would be liable to a common law action for occupational disease due to his negligence as though the Act had not been passed.

II. Other Statutes.

There are no specific statutes relating to dust hazards in factories and foundries which could be the basis of negligence on the part of the employer in a suit at common law for disability resulting from the inhalation of dust.

Sec. 42-117, under the title of "Foods and Drugs", treats a very limited number of establishments. This section reads:

"Every place occupied or used for the preparation for sale, manufacture, packing, storage, sale or distribution of any food shall be properly lighted, drained, ventilated, screened, and conducted with strict regard to the influence of such conditions upon the health of the operatives, employees, clerks, or other persons therein employed, and the purity and wholesomeness of the food therein produced."

Certain general statutes of the Code, however, do set up certain common law rules to govern the employer in his relation to the employees.

Sec. 66-301, under the title "Master and Servant," reads:

"The master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency; he shall use like care in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery, or dangers incident to an employment unknown to the servant, of which the master knows or ought to know, he shall give the servant warning in respect thereto."

Sec. 66-303 provides:

"A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of the master in failing to comply with the duties imposed by Sec. 66-301, in order that the servant may recover, it must appear that the master knew or ought to have known of the incompetency of the other servant or of the defects or danger in the machinery supplied; and it must also appear that the servant injured did not know and had not equal means of knowing such facts, and by the exercise of ordinary care could not have known thereof."

Sec. 66-304 reads:

"Except in cases of railroad companies, the master shall not be liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business."

Sec. 54-303 prohibits the employment of children under 16 years of age in certain occupations, including particularly work in any process in which dangerous or poisonous acids are used; the manufacturing or packing of paints, colors, white or red lead; occupations causing dust in injurious quantities; the manufacture of compositions with dangerous or poisonous gases; tunnel or excavation work; and any work in and about mines, coke breaker, coke oven, or quarry.

III. Common Law Liability.

Attention is called to the case of *Webb v. Tubize-Chatillon Corp.*, supra, *Maloney v. Kirby*, supra, and *Stebbens v. Georgia Veneer & Package Co.*, supra, which held that where the employer and employee came within the Act, there could be no

recovery at common law since the Act is exclusive of all other remedies.

Although no cases have been found where recovery has been granted at common law for disability resulting from inhalation of dust based upon the negligence of the employer in allowing the accumulation of such noxious dusts, it is assumed that such right of action exists, when not superseded and barred by operation of the Workmen's Compensation Act. This position is strengthened by the cases reviewed where the claim was made under the Workmen's Compensation Act for disability resulting from an occupational disease. The court, in none of these cases, denies that a common law recovery would be possible if the parties were not governed by the terms of the Act.

IV. Miscellaneous Matters of Interest.

1. **Statute of Limitations.** By Sec. 3-1004, actions to recover for injury to person must be brought within two years of the time when the cause of action arose; if death resulted, those entitled to maintain the action must bring it within two years of the time of death.

In *Davis v. Boyett*, 120 Ga. 640, 48 S. E. 185 (1904), a father brought suit for the seduction of his daughter. The defendant pleaded the statute of limitations. The court held that the cause of action arose when the act was completed and not when the father discovered what had occurred; that mere ignorance of the facts constituting a cause of action did not prevent the running of the statute of limitations.

For similar holdings, see:

Barrett v. Jackson,

44 Ga. App. 611, 162 S. E. 308 (1932);

Silvertooth v. Shallinberger,

49 Ga. App. 133, 174 S. E. 365 (1934).

In *Dalrymple v. Brunswick Coca-Cola Bottling Co.*, 181 S. E. 597 (Court of Appeals, 1935), the plaintiff contracted tuberculosis by reason of defendant's causing him to work in company with a person suffering from such disease. This constituted an actionable injury and the issue before the court was whether or not the action was barred, since suit was not brought within two years of the time that the disease was communicated to the plaintiff. The court held:

"Where the alleged tortfeasor, or those under whom he claims, has been guilty of no fraud by which the person injured has been debarred or deterred from instituting suit within the period of limitation, mere ignorance of the person injured of the

existence of facts constituting a cause of action does not prevent running of the statute of limitations."

It was the conclusion of the court that the right of action began to run from the date of contracting the disease notwithstanding he was ignorant of the fact of having contracted it and didn't become aware of having contracted it until some time later when informed by a physician.

NOTE: This decision does not disclose how the right of the employee to sue at common law was preserved, in view of the exclusive character of the Workmen's Compensation Act. It is presumed that the employer had rejected the Act.

Under these decisions, it would appear that, in cases where disability resulted from inhalation of dust, the statute would begin to run at the time the diseased condition came definitely into existence, certainly no later than the date of last exposure, even though it was not discovered by the employee until long afterward.

2. No survey has been made of the hazard of occupational diseases in this state, nor has any bill been introduced nor is such now pending in the General Assembly treating such diseases. The General Assembly will not convene until 1937 unless called into extraordinary sessions by the Governor.

CHAPTER XIV

IDAHO

I. Workmen's Compensation.

1. Statutes. Idaho Code, Annotated, 1932, Sec. 43-901 through Sec. 43-1903.

2. Administration. The Act is administered by the Industrial Accident Board, which is composed of three members, appointed by the Governor for terms of six years. Not more than one may be classed as a representative of employers or of employees and not more than two may be of the same political party. Communications may be addressed to the Board at Boise, Idaho.

3. Scope of the Act. Sec. 43-902 declares that the common law system governing the remedy of workmen against employers for injuries received in industrial and public work is inconsistent with modern industrial conditions. It then provides:

"* * * The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Sec. 43-1003 provides:

"The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury."

Among the definitions of terms used in the Act, we then find the following:

Sec. 43-1809:

"'Injury' or 'personal injury' includes death resulting from injury within two years after the accident but is not to be construed as being synonymous with accident. An 'injury' or 'personal in-

jury' to be compensable must be the result of an accident."

Sec. 43-1810:

"The words 'personal injury by accident arising out of and in the course of such employment' shall include an injury caused by the willful act of a third person directed against an employee because of his employment. They shall not include a disease except as it shall result from the injury."

Under these provisions, it would seem that disability resulting from an occupational disease caused by the inhalation of dust would be excluded under the Act, and statements to that effect appear in the opinions. However, the Supreme Court of this state has given the word "accident" a somewhat different meaning from that commonly applied, in that the necessity of there being an injury traceable to a sudden, definite and single event is obviated so that compensation may be granted where there has been a cumulation of events over a long period of time so long as the injury be the result of "an unlooked for mishap or an untoward event which is not expected or designed." The cases should be carefully observed.

4. Court Construction.

A. Definition of "Accidental Injury."

The courts of this state have gone very far in placing a liberal construction upon the Workmen's Compensation Act so as to cover, so far as possible, and include within the Act, disability which ordinarily would be considered occupational disease, although the Act does not provide compensation for occupational disease if strictly construed. This liberality of construction is achieved through definition of the term "accident." We find it as early as 1926 in the case of *Aldrich v. Dole*, 43 Idaho 30, 249 P. 87, where compensation was allowed to a truck driver. The case does not involve what we commonly understand as an occupational disease, but the reasoning and discussion of terms are very important.

The plaintiff drove a truck in the employ of the defendant between September 12th and October 17, 1923. Because of the worn gears, it was necessary for plaintiff to press the shift lever with his right knee, and in so doing, the knee became bruised resulting in disablement. The court in granting compensation said that the expression of "accident," as used in the popular and ordinary sense of the word, denotes "an unlooked for mishap or an untoward event which is not expected or designed." The opinion reads:

"That there been a single occasion when the knee

pressed the lever and was struck by it, and injury had resulted therefrom, there would be no difficulty in concluding that the injury was received by accident. In such case it would be said that in the discharge of his duties, the workman placed his knee against the lever, the lever struck the knee, the injury resulted; and it would not be said that the injury was usual, was expected, or was designed. Now, if the single pressing of the knee against the lever and the single striking of the knee by the lever would result in an injury by accident, can we say that the injury actually received was not caused by accident merely because there was a continuation of the causes that brought on the injury. The statute does not restrict compensation to an injury that results from a single event, and there would seem to be no sound reason for holding that an injury occasioned by a number or series of events is not within the act. The continuous pressing of the lever and the repeated striking of the knee had a cumulative effect so that the injury came on gradually; and claimant received the unexpected and unintentional injury during the time of the operation of the causes that produced the injury. ♦ ♦ ♦ ♦ (Bold face type ours)

The court does not seem to consider the length of time during which the disability accrued as of controlling importance. It emphasizes that the injury resulting was unexpected and unintentional. If pressure upon the knee for a period of five weeks results in "accidental injury", it might well be that inhaling harmful dust over a much longer period would be considered "accidental injury" if the result was unexpected and unintentional. In fact, the court reaches almost that identical conclusion in a later case involving the inhalation of silica dust which we shall refer to herein.

Another case of interest where disability was caused by breathing poisonous gas was decided in 1929. It is: *Sullivan Mining Co. v. Aachenbach*, 33 F. (2d) 1 (C.C.A. 9th). This was a common law action for damages and the question was whether the plaintiff's relative was to recover compensation under the Act. It was held that his disability was compensable and that he therefore did not have a right to recovery at common law. He had breathed poisonous gas while working in a closed room as a painter from January 13th to January 20, 1928. The employer failed to warn the plaintiff that the gas from the paint was extremely poisonous, and the employee was ignorant of that danger.

The court stated that an injury by accident need not result from a sudden or violent cause or that the cause or agency be

accidental or unexpected, but that, under the Idaho law, a workman may be said to receive a personal injury by accident when, from the operation of known and usual causes, he receives an injury, neither expected nor designed; an injury occasioned by a number or series of events might be within the Act. It also declared that the injury here was not in any real sense an occupational disease, but was more in the nature of an acute case of poisoning; that the disability resulted unexpectedly and suddenly from an unusual hazard which was not a common incident of a painter's occupation, but was fortuitous.

Again in 1931, a rather similar decision was rendered in *Ramsay v. Sullivan Mining Co.*, 6 P. (2d) 856. In it the plaintiff was totally disabled from lead poisoning received in the employ of the defendant as a lead burner for a period of approximately one month. The evidence showed that the oxide of lead being absorbed into the body of the plaintiff brought about a result in a few weeks, which, according to the testimony of all physicians, would usually take a period of months or possibly years. The court held that this was not the customary or natural result that follows the absorption of lead oxide into the system; that it was not an occupational disease, and therefore allowed compensation under the Workmen's Compensation Act for the disability.

The court stresses the fact that neither the employer nor the employee anticipated the result; that it was wholly unexpected, unusual, and unlooked for; that the employee did not knowingly submit himself to the hazard of the work he was doing; that he had no experience or information as to the danger of the work; and that the employer likewise did not realize the danger of it. The court therefore concluded that the injury was caused by accident and was therefore compensable.

It is manifest that this reasoning brings many types of disability under the Workmen's Compensation Act which would be barred if a strict construction of the Act had been adopted.

A case of even greater interest was decided in 1934 by the Supreme Court of Idaho. It is: *Beaver v. Morrison-Knudsen Co.*, 41 P. (2d) 605. The disability in this case arose from inhaling silica dust. Beaver was employed by the defendant from June, 1928, till October, 1931. He performed various duties, including truck driving, general work, repair work, rock crusher work, and hot plant work. For three or four months each year, he worked in thick clouds of dust, containing from eighty to eighty-five per cent silica. He had a cough which gradually

grew more severe, and he began spitting blood in February, 1931. After February, he did not work in the dust. In November, 1931, he discovered that he had tuberculosis.

The court found that Beaver had tuberculosis, probably before 1928, but that the breathing of the silica dust set up an irritation in his lungs and "lighted up his tuberculosis." It had produced that effect by February, 1931, and he grew rapidly worse until October, 1931, when he quit work. He died some time later. On these facts, the court held that disability was due to accidental injury, and compensation was allowed.

Silicosis as such is not mentioned in the opinion, and there was evidences of pre-existing tuberculosis, but nevertheless the case goes a long way as a precedent for allowing compensation in silicosis cases. Again the court refuses to confine "accidental injury" to some accident which occurs at a specific time and place. The following comment of the court is interesting:

"If a workman drives his employer's automobile for a couple of years until he wears the tires down to the inner tubes and suddenly a tire 'blows out' and the car goes into the ditch and kills the workman, no one doubts but that an 'accident' has occurred, although the rocks had been grinding on that tire for a couple of years. Now if silica dust develops latent tuberculosis until his lungs give out (blow up) and he dies, is there any material difference in the time, place and circumstances of the accidents? Is not the one as much an 'accident' as the other?"

In view of the foregoing court decisions, it cannot be said with certainty that occupational disease is not compensable under the Workmen's Compensation Act. Certainly it is not compensable if the disease is one resulting from the inherent nature of the work which is known commonly to result, and which could not be avoided by the exercise of reasonable care. As to whether or not occupational disease otherwise defined is compensable, the foregoing decisions are the best answer.

II. Exclusiveness of the Workmen's Compensation Act.

Operation of industry under and in accordance with the Act is compulsory.

By Secs. 43-902 and 43-1003 hereinabove quoted, the employer is limited to his right to compensation under the Act "on account of a personal injury for which he is entitled to compensation."

We find no decision squarely deciding whether these provisions

ions abolish the employee's common law right of recovery for disability not compensable under the Act, e. g., disease caused by the employer's negligence, but not of such character as to be classed as "accidental injury." In some states, such rights would be barred, on the theory that the Workmen's Compensation Act is a complete system and is substituted for all common law rights. We do not believe that the Idaho courts would go that far. It has been held, for example, in *McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068, that the Act "is to be liberally construed with a view to effect its objects and promote justice." Another significant statement appears in *Sullivan Mining Co. v. Aachenbach*, cited above, to the effect that, if the injury therein complained of resulted from an "accident," it was compensable, but "otherwise it was cognizable in courts of law." This statement clearly recognizes the continued existence of the right to maintain a common law action, except as to injuries for which compensation is provided in the Act.

II. Other Statutes.

1. **Safety Provisions of Workmen's Compensation Law.** Chapter 19 of the Workmen's Compensation Act provides for extensive control of working conditions by the Industrial Accident Board. This chapter includes the following three sections, the first one being quoted in full:

Sec. 43-1901. "The Board shall have the power, in addition to other powers herein granted, whenever it has information that any employer subject to the provisions of this act is employing workmen in or about any structure, room, or place of employment which is not constructed and maintained in conformity with reasonable standards of construction as shall render it safe, or is employing workmen *out* or *with*, tools, equipment, or machinery which are not supplied with safety devices, safeguards or other means of protection well adapted to render employees and places of employment safe, to compel such employer to cease employing workmen in such places, or on, or with, such tools, appliances or machinery."

Sec. 43-1902 provides for investigations and hearings as to the safety of employees and the places of employment.

Sec. 43-1903 provides penalties for the violation of safety provisions.

2. Mining Laws.

Under "Mines and Mining" there are certain statutes relating to dust. Sec. 46-501 provides:

"It shall be unlawful for any owner, operator or person in charge of any underground mine to cause to be drilled or bored by machinery a hole or holes in any stope or rise in ground that causes dust from drilling, unless such machinery is equipped with a water jet or spray or other means equally efficient to prevent the escape of dust."

Sec. 46-502 provides:

"Where machinery used for drilling or boring holes in stopes or rises is equipped as required by the preceding section it shall be unlawful for any person or persons to drill or bore a hole in said stope or rise without using said appliance for the prevention of dust."

Sec. 46-503 provides that breach of either two of the preceding sections constitutes a misdemeanor and also fixes a fine.

These sections are administered by the Inspector of Mines, who has the power to promulgate reasonable regulations for safety and health of the employees in the mines. So far as we have been able to ascertain, no such rules, of a general character have been promulgated.

3. Department of Immigration, Labor and Statistics.

By Sec. 65-2701, this Department has power to declare and prescribe what safety devices, safeguards, and other means and methods of protection are well adapted to render employees and places of employment safe, and also to fix and order such reasonable standards for the construction, maintenance, and repair of places of employment as shall render them safe. It is empowered to require the performance of any act necessary for the protection of the life, health, and safety of employees. No such rules can be cited at this time.

III. Common Law Liability.

It is assumed that, in the absence of statutes denying such right, the usual common law right of action exists in Idaho for injuries, including disease, if caused by the employer's negligence.

There are no general statutes relating to dust hazards, or relating to or denying the usual common law defenses.

For a discussion of the effect of the Workmen's Compensation Act upon the common law rights, see Section II, 4 B above.

IV. Miscellaneous Matters of Interest.

1. **Statute of Limitations.** By Sec. 6512, sub-division 4, an action to recover damages for an injury to the person or for the death of one caused by the wrongful act or negligence of another must be brought within two years from the time the

cause of action accrued. By Sec. 6624, if a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced by his representatives within one year from the death.

2. No official survey has been made of dust hazards and silicosis in Idaho. At the present time, there is no bill of any kind relating to such matters pending before the state legislature.

CHAPTER XV ILLINOIS

I. Workmen's Compensation Act.

1. Statutes. Illinois Revised Statutes, 1935, ch. 48, Secs. 201-236.

2. Administration. The Act is administered by the Industrial Commission consisting of five members appointed by the Governor, two of whom shall represent employers, two employees, and one of whom shall not be identified with either the employing or employee class and who shall be designated by the Governor as chairman (ch. 48, Sec. 213).

Communications may be addressed to the Industrial Commission at 205 West Wacker Drive, Chicago, Illinois.

3. Scope of the Act. The purpose of the Act, as stated in the preamble, is "to promote the general welfare of the people of this state by providing compensation for accidental injuries or death suffered in the course of employment * * *." The same phrase "accidental injuries" appears in Sec. 1 of the Act. There is no definition in the Act of "accidental injury" nor is there any provision as to diseases; but, if such could be deemed an "accidental injury," it would be compensable under the Act.

4. Court Construction. The following decisions are cited as illustrative only, and not as an exhaustive list of decisions construing this Act with respect to the character of injury covered. The courts have not expanded the term "accidental injury" beyond the ordinary meaning of those words, and have not so construed it as to include occupational disease. The courts, however, do not deny compensation where there has been an accidental injury merely because a disease results or a pre-existing disease is aggravated.

In *Munn v. Industrial Board*, 274 Ill. 70, 113 N. E. 110 (1916), compensation was granted where an employee died as a result of being overcome by fumes and smoke in an effort to extinguish a fire.

In *Matthiessen & Hegeler Zinc Co. v. Industrial Board*, 284 Ill. 378, 120 N. E. 249 (1918), compensation was granted where the death of an employee resulted from arsenical poisoning in the course of his employment as fireman in defendant's zinc smelter, though such occurred as the cumulative result of many years' exposure to the same condition of fumes and gases.

The court stated that "accidental injury" as used in the

Workmen's Compensation Act included every injury suffered in the course of employment for which there was an existing right of action at the time the Act was passed, and also that "an injury is accidental, within the meaning of the act, which occurs in the course of employment unexpectedly and without the affirmative act of the employee."

The complainant was held not to be suffering from an occupational disease because such "has its inception in the occupation and develops over a long period of time from the nature of the occupation and not from any unusual or unforeseen event." For fifty years, there had never been a case of arsenical poison in defendant's plant.

In *Chicago Rawhide Mfg. Co. v. Industrial Commission*, 291 Ill. 616, 126 N. E. 616 (1920), compensation was granted for an accidental injury within the meaning of the Workmen's Compensation Act, where death occurred as a result of contracting anthrax from handling diseased hides in the course of the employment.

In *Peru Plow & Wheel Co. v. Industrial Commission*, 311 Ill. 216, 142 N. E. 546 (1924), compensation was denied under the Workmen's Compensation Act where the plaintiff's disability resulted from continuously breathing iron dust over a period of five years while in defendant's employment. There was no evidence of an unusual inhalation of such dust at any one time. The court said that, in order for an injury to be accidental,

"* * * it must be traceable to a definite time and place of origin. There must be some definite thing happen which can be pointed to as the immediate cause of the breakdown, although the employee may have been able to work in similar conditions for a considerable period of time prior to the happening of the event which was the immediate cause of his breakdown. * * *"

Mathlesson & Hegeler Zinc Co. v. Industrial Board, supra, was distinguished by a statement that the arsenical poisoning in that case was contracted on a fixed date.

In *New Marlissa Coal Co. v. Industrial Commission*, 326 Ill. 116, 157 N. E. 32 (1927), compensation was granted under the Workmen's Compensation Act where plaintiff, a coal miner, was disabled as a result of breathing bad air in defendant's mine on a fixed date. The court specifically stated:

"Mine gas poisoning is an accidental injury under the Workmen's Compensation Act."

In *Monarch Battery Co. v. Industrial Commission*, 354 Ill. 494 188 N. E. 413 (1933), compensation was granted under the

Workmen's Compensation Act. The evidence was held to sustain a finding that the employee died from acute lead poisoning.

Deceased was employed in the manufacture of lead batteries from April 28, 1931, to May 13, 1931, and from August 18th following until September 23rd, when he became ill, and from September 27th until October 2nd. Death occurred October 5th. He was healthy prior to September 23rd. The issue as to whether such constituted an accidental injury or an occupational disease was not discussed by the court, but the adoption of the testimony that it was acute poisoning brought the disability within the definition of "accidental injury."

5. **Recent Amendment.** A bill was recently passed by the state legislature amending Sections 7, 8, 14, and 19 of the Workmen's Compensation Act. This amendment, presumably, takes effect July 1, 1936, although it is a companion to the Workmen's Occupational Disease Act which by its own terms becomes effective October 1, 1936.

This amendment to the Workmen's Compensation Act will effect a number of changes in which we are not interested for the purpose of this survey. Section 19 (a) (1) of the Act (Code ch. 48, Sec. 219 (a) (1), which is added by the amendment, corresponds with Section 19 (a) (1) (1) of the newly enacted Workmen's Occupational Disease Act, and the two sections operate with the common purpose of preventing a failure to collect compensation by reason of filing claim under the wrong act.

II. **Workmen's Occupational Disease Law—Present Act, in Force Until October 1, 1936.**

1. **Statutes.** Illinois Revised Statutes, ch. 48, Secs. 185-200 inclusive.

2. **Administration.** The Act is administered by the Industrial Commission.

3. **Scope of the Act.** This Act was passed in 1911, and will remain in force until the new Occupational Disease Law becomes effective on October 1, 1936. The new Act specifically preserves all rights of action existing at the time it takes effect and provides that, after its effective date, compensation shall not be granted under the new Act for disablement which occurred prior to the effective date of the new Act. It is therefore necessary to study the present Act, for its effectiveness will not cease when the new Act becomes law.

Section 1 contains the most important statement of the scope of the Act. It reads:

Code 48-185. "Be it enacted * * * that every employer of labor in this State, engaged in carrying on any work or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employees to the danger of illness or disease incident to such work or process, to which employees are not ordinarily exposed in other lines of employment, shall, for the protection of all employees engaged in such work or process, adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process."

This section was declared unconstitutional in the case of *Parks v. Libbey-Owens-Ford Glass Co.*, 360 Ill. 130, 195 N. E. 616 (1935), and in *Boshuizen v. Thompson & Taylor Co.*, 360 Ill. 160, 195 N. E. 625 (1935). Those decisions also make inoperative, Section 15 (a) of the Act (Code 48-199) (a), which provides a right of action based upon violation of Section 1.

In determining whether or not conditions of employment give rise to a cause of action under the Occupational Disease Act, it is now necessary to study Section 2 (Code 48-186). It has been the subject of court construction several times, and the Supreme Court of Illinois finally, in the case of *David F. Burns v. Industrial Commission*, 356 Ill. 602, 191 N. E. 225 (1934), inserted the word "or" between the words "employees" and "engaged," as indicated by parentheses in the section hereinafter set forth. By this decision, the court recognizes three classes of occupations, the third one being created through the use of the word "or", as above stated. For convenience, in the copy set forth below, we have indicated by numbers (the three classes so recognized. Such numbers do not appear in the text. The section is as follows:

Code 48-186. "Every employer in this State engaged (1) in the carrying on of any process of manufacture or labor in which sugar of lead, white lead, lead chromate, litharge, red lead, arsenate of lead, or Paris green are employed, used or handled, or (2) the manufacture of brass or the smelting of lead or zinc, which processes and employments are hereby declared to be especially dangerous to the health of the employees (or) (3) engaged in any process of manufacture or labor in which poisonous chemicals, minerals or other substances are used or handled by the employees therein in harmful quantities or under harmful conditions, shall provide for and place at the disposal of the employees engaged in any such process or manufacture and shall main-

tain in good condition and without cost to the employees, proper working clothing to be kept and used exclusively for such employees while at work, and all employees therein shall be required at all times while they are at work to use and wear such clothing; and in all processes of manufacture or labor referred to in this section which are unnecessarily productive of noxious or poisonous dusts, adequate and approved respirators shall be furnished and maintained by the employer in good condition and without cost to the employees, and such employees shall use such respirators at all times while engaged in any work necessarily productive of noxious or poisonous dusts."

Section 3 (Code 48-187) requires every employer carrying on any process referred to in Section 2, quoted above, to cause all employees who come in direct contact with "poisonous agencies or injurious processes" referred to in Section 2 to be examined by a physician as often as once each month, for the purpose of ascertaining the presence of occupational disease or illness. Under the next section, the examining physician is required to make a report thereof to the State Board of Health.

Section 6 (Code 48-190) requires every employer engaged in any process of manufacture referred to in Section 2 to provide a dressing room and lavatory "for the use of such employees who are exposed to poisonous or injurious dusts, fumes and gases," and that the same should be kept clean and equipped with sufficient facilities for bathing, etc.

Section 7 (Code 48-191) prohibits taking food or drink into any room or apartment where any process of manufacture referred to in Section 2 is carried on, or "or in which poisonous substances or injurious or noxious fumes, dusts or gases are present as the result of such work or process being carried on in such room or apartment."

Section 8 provides:

Code 48-192. "All employers engaged in carrying on any process or manufacture referred to in section 2 of this Act, shall provide and maintain adequate devices for carrying off all poisonous or injurious fumes from any furnaces which may be employed in any such process or manufacture, and shall also provide and maintain adequate facilities for carrying off all injurious dust, and the floors in any room or apartment where such work or process is carried on shall, so far as practicable, be kept and maintained in a smooth and hard condition, and no sweeping shall be permitted during working hours except where the floors in such workshop are damp-

ened so as to prevent the raising of dust; and all ore, slag, dross and fume shall be kept in some room or apartment separate from the working rooms occupied by the employees, and where practicable, all mixing and weighing of such ore, slag, dross or fume shall be done in such separate room or apartment, and all such material shall, so far as practicable, be dampened before being handled or transported by employees."

Section 9 (Code 48-193) requires certain precautions when cleaning flues.

Section 10 provides:

Code 48-194. "All hoppers or chutes or similar devices used in the course of any process or manufacture referred to in section 2 of this Act shall, where practicable, be provided with a hood or covering, and an adequate and sufficient apparatus or other proper device for the purpose of drawing away from the employees noxious, poisonous or injurious dusts, and preventing the employees from coming into unnecessary contact therewith; * * *

By Sections 11 and 12 (Code 48-195 and 196), the State Department of Factory Inspection is empowered to enforce the provisions of the Act and to order the installation of approved appliances, devices, means or methods to prevent the contracting or continuance of disease.

By Section 15 (b) (Code 48-199) (b), it is provided that, if an employee is disabled or dies by reason of occupational disease arising out of and in the course of his employment in one or more of the occupations referred to in Section 2 of the Act, he or his dependents shall be entitled to compensation in the same manner and subject to the same terms, conditions, and limitations as are provided by the Workmen's Compensation Act for accidental injuries.

Section 15 also contains the following definitions: "Disability" as:

"The state of being disabled from earning full wages at the work at which the employee was last employed by the employer from whom he claims compensation;"

"Disablement" as:

"The act of becoming disabled from earning full wages at the work at which the employee was last employed by the employer from whom he claims compensation;"

"Occupational Disease" as:

"A disease peculiar to and due to the nature of an employment in one or more of the occupations referred to in Section 2 of this Act;"

"Occupations" as meaning and including:

"Each and every process, manufacture, employment, and process of manufacture or labor referred to in Section 2 of this Act."

Recovery under this Act for occupational disease is made the exclusive remedy available to the employee by the following provision, which is Section 15 (b) 4:

Code 48-199 (b) 4. "This subdivision (b) of this section shall apply automatically and without election to all employees and employers engaged in the occupations referred to in section 2 of this Act. No common law or statutory right to recover damages for injury or death sustained by any employee by reason of an occupational disease arising out of and in the course of his employment in one or more of the occupations referred to in section 2 of this Act, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this subdivision (b) of this section, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury. The compensation herein provided, together with the provisions of this subdivision (b) of this section, shall be the full, complete and only measure of responsibility of any employer engaged in any of the occupations referred to in section 2 of this Act."

4. Court Construction.

A. Is compensation recoverable for silicosis and dust diseases under this Act?

As heretofore stated, Section 1 of this Act was declared unconstitutional in *Parks v. Libbey-Owens-Ford Glass Company*, which decision was rendered April 17, 1935. Prior to that time, the Supreme Court of Illinois had held that a right of action existed for silicosis under that section. Such was the court's decision in *First National Bank of Ottawa v. Western Silica Co.*, 351 Ill. 560, 184 N. E. 897 (February, 1933). A former employee, Charles Clouse, suffered permanent injury from inhaling silica dust while working about the defendant's silica plant. A judgment for \$10,000.00 was rendered and was affirmed by the Supreme Court. The defendant contended

that Section 15 of the Occupational Disease Act, as amended to its present form in 1923, was unconstitutional in that it made arbitrary and unreasonable discriminations against persons in the same classes, which classes were defined in Sections 1 and 2 of the Act. Section 1 specified certain protection to that class of employees named in it, and Sections 15 (a) provided a right of action for violation of Section 1.

The right of action existing under Section 15 (a) was not granted to those classes of occupations named in Section 2, but instead the right of compensation was specified with respect to them by the provisions of Section 15 (b).

The question was therefore inherent in this case as to whether the plaintiff came within the class named in Section 1 or one of the classes named in Section 2. If in the Section 1 class, he had a common law right of action; if in one of the classes named in Section 2, he had only the right to compensation. In affirming the judgment of the trial court, the Supreme Court recognized silicosis as covered only by Section 1 and as not being within the classes of disease compensable under Section 2 and Section 15 (b). The exact language of the court in that connection is:

"Almost ten years have elapsed since that amendment without the law being further changed in any way. Whether the increase of medical and industrial knowledge concerning silicosis would warrant the transference of appellant's business from section 1 to section 2 of the Occupational Disease Act is for the Legislature, and not for this court, to say. The wisdom or lack of wisdom shown by the Legislature in failing to include the silica industries in the classification in section 2 of the Occupational Disease Act does not concern this court."

The decision in *Parks v. Libbey-Owens-Ford Glass Company*, holding Section 1 unconstitutional, in April, 1935, did not disturb the court's previous announcement in the case above discussed, to the effect that silicosis is not covered by Section 2, or, in other words, that it is not compensable under Section 2. In fact the court specifically says in the *Parks* case:

"In *First National Bank v. Wedron Silica Co.*, the action was for damages for a personal injury to an employee's health caused by exposure to and the inhalation of silica dust. It was stated that the silica industries were not included in the classification of section 2, and that it was for the Legislature, and not this court, to determine whether increased knowledge concerning silicosis would war-

rant the transfer of the business of mining and processing silica from section 1 to section 2 of the Occupational Diseases Act."

It is interesting to note that the above statement was made in the *Parks* case while the court was discussing its previous decision in *Burns v. Industrial Commission*, 356 Ill. 602, 191 N. E. 225 (June, 1934), in which it had defined three classes under Section 2 by inserting the word "or". It may therefore be said, with considerable confidence, that, notwithstanding the creation of a third class under Section 2 by the insertion of "or" in the text of the Act, the Supreme Court still refuses to recognize mining and processing silica as within any of the classes named in Section 2, and hence diseases arising therefrom are not compensable.

B. Statute of Limitations.

Although rendered before Section 1 was held unconstitutional, the following case is of interest on the general subject of when the cause of action arises, and that question is of course of interest only if it is finally determined that a common law right of action exists at all in Illinois for occupational disease.

In *Madison v. Wedron Silica Co.*, 352 Ill. 60, 184 N. E. 901 (1933), the plaintiff was employed from 1924 to 1930, and contracted silicosis. It was urged that the general statute of limitations applied and that it started to run from the time of the first inhalation, that being the first breach of duty on the part of the employer. The court rejected that view and said:

"The logical view is to consider the time when the employee is forced to quit work because of the cumulative effect of successive injuries resulting in final disablement rather than the first inhalation or injury."

III. Workmen's Occupational Disease Law—New Act, Effective October 1, 1936.

The state legislature recently enacted a new Workmen's Occupational Disease Act which will become effective October 1, 1936, and which repeals the former Act which is discussed in Section II above. The repealing section provides that rights of action existing under the previous Act, at the time the new Act takes effect are not extinguished. It further provides that no employer shall be liable for compensation or damages under the New Act in any case in which the disablement on which the claim is predicated shall have occurred prior to October 1, 1936. The new Act is comprehensive, consisting of thirty-four

sections, and is so framed as to be in harmony with the Workmen's Compensation Act, but it does not repeal or alter the Workmen's Compensation Act. The two will be administered concurrently.

It is impossible, within the limits of this survey, to adequately outline the provisions of the new Act, and the analysis herein given cannot be relied upon as exhaustive. As indicating the general character of the Act, the following outline is presented. References are to section numbers of the Act.

Section 2:

"There shall be no liability of any employer for compensation or damages for or on account of any injury to health, disease, or death therefrom, other than for the compensation herein provided or for damages as provided in Section 3 of this Act; * * *

Section 3 creates or provides a right of action to any employee who sustains injury to health by reason of disease contracted in the course of employment, and proximately caused by the negligence of the employer, and a right of action for death resulting from such cause, unless the employer shall have elected to provide and pay compensation as provided in the Act. Recovery for death is limited to \$10,000.00; violation of any effective rule made by the Industrial Commission pursuant to the Health and Safety Act, or of any statute intended for the protection of health of employees, constitutes negligence; action for damages for injury to health must be commenced within three years after the last day of exposure to the hazards of the disease, and every such action for damages in case of death must be commenced within one year after the death of the employee and within five years after the last day of the last exposure to the hazards of the disease; common law defenses of assumed risk and fellow servant are denied the employer, and the defense of contributory negligence is denied where such contributory negligence was not wilful.

Section 4. The Act is elective as to employers and shall apply to cases in which the last day of exposure occurred on and after the effective date of such election. An employer who has elected to come under the Act has a limited right to withdraw therefrom during the first five years of its operation; employees may elect to reject the Act within thirty days after the employer has accepted its provisions; otherwise the employees are deemed to have accepted all provisions of the Act, but employees engaged after the employer's election are

deemed covered by the Act and have no right of rejection thereof.

The Act does not make clear the effect of rejection thereof by the employee, for it is provided:

"The compensation herein provided for shall be the full, complete and only measure of the liability of the employer bound by election under this Act and such employer's liability for compensation and medical benefits under this Act shall be exclusive and in place of any and all other civil liability whatsoever, at common law or otherwise, to any employee or his legal representative on account of damage, disability or death caused or contributed to by any disease contracted or sustained in the course of the employment."

Section 5. This section includes, among others, the following definitions:

"'Disablement' means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation, or equal wages in other suitable employment; and 'disability' means the state of being so incapacitated."

Compensation is not payable unless disablement occurs within one year after the last day of the last exposure to the hazards of the disease, except in cases of occupational disease caused by the inhalation of silica dust or asbestos dust; in such cases, it must be brought within three years after the last day of the last exposure.

Section 6:

"In this Act the term 'Occupational Disease' means a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the said diseases follow as an incident of an occupational disease as defined in this section.

"A disease shall be deemed to arise out of the employment, only if there is apparent to the rational mind upon consideration of all the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the

employment and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

Section 7. This specifies the compensation allowable in case of death and conforms to the schedule contained in the Workmen's Compensation Act. The maximum recovery is \$5500.00, except when a penalty is imposed in connection with the death of minors under sixteen years of age illegally employed, in which event the maximum appears to be \$6000.00.

Section 8. This provides the schedule of compensation for disability where death does not result, and it conforms to the schedule contained in the Workmen's Compensation Act, with a few modifications of minor importance.

Section 10. The method of computing the average earnings for the employee is here outlined in detail. It is based primarily upon the earnings for the year next preceding the last day of the last exposure, with necessary modifications for seasonal occupations and peculiarities of certain employments.

Section 11. This section authorizes any party in interest to demand an autopsy and requires an official report of the findings. This is applicable only where it appears that the autopsy may disclose material evidence as to whether or not death was due to inhalation of silica or asbestos dust.

Section 12. Medical examination may be demanded by the employer of any employee entitled to receive compensation.

Section 13. This section prohibits recovery under this Act when recovery is possible under the Workmen's Compensation Act.

Sections 15 to 22 inclusive. Administrative provisions providing for administrations by the Industrial Commission.

Section 23:

"* * * any employee who prior to the taking effect of this Act has contracted silicosis or asbestosis but is not disabled therefrom, may within sixty days after the taking effect of this Act, file with the industrial commission a request for permission to waive full compensation on account of

disability or death resulting from silicosis or asbestosis, or any direct result thereof, supported by medical evidence satisfactory to the industrial commission, that he has actually contracted silicosis or asbestosis but is not disabled therefrom, and if the industrial commission shall approve such waiver, the compensation payable, for such resulting disability or death of such employee, after further exposure in the employment of any employer who has elected pursuant to paragraphs (a) and (b) of section 4 of this Act, shall be fifty per centum of the compensation which but for such waiver would have been payable by any such employer."

Section 24. This requires notice to the employer within six months after the occurrence of the disablement and the filing of application for compensation within one year after the date of disablement, or within one year after the date of the last payment of compensation, if any has been paid.

Section 25. This section defines exposure and cannot be well paraphrased.

"An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time however short, he is employed in an occupation or process in which the hazard of the disease exists.

"The employer liable for the compensation in this Act provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease claimed upon regardless of the length of time of such last exposure. provided, that in cases of silicosis or asbestosis, the only employer liable shall be the last employer in whose employment the employee was last exposed during a period of sixty (60) days or more after the effective date of this Act, to the hazard of such occupational disease, and, in such cases, an exposure during a period of less than sixty (60) days, after the effective date of this Act, shall not be deemed a last exposure.

"The insurance carrier liable shall be the carrier whose policy was in effect covering the employer liable on the last day of the exposure rendering such employer liable in accordance with the provisions of this Act."

Section 26. This authorizes the employer to act as a self-insurer by complying with detailed regulations therein set forth.

Sections 27 to 29, inclusive, contain other administrative regulations with respect to payment of compensation and the

rights of the employee where third persons are involved.

Section 30. Reports with respect to occupational diseases and deaths resulting therefrom are required.

Section 31. This section requires the posting of information concerning the Act.

Section 32. Prescribe a fine of not less than \$10.00 nor more than \$500 for neglect, refusal, or failure to comply with the Act

Section 33. Prescribes a fine of not less than \$10.00 nor more than \$500.00 for neglect, refusal, or failure to comply with the Act.

Sections 34 and 35 have been heretofore covered.

IV. General Statutes.

1. Examination of Butterine and Ice Cream Factories—Revised Statutes, ch. 48, Sec. 118:

"* * * all buildings or rooms occupied by butterine and ice cream manufacturers shall be drained and plumbed in a manner conducive to the proper and healthful sanitary condition thereof, and shall be constructed with air shafts, windows and ventilating pipes sufficient to insure ventilation. The factory inspector shall direct the proper drainage, plumbing and ventilation of such rooms or buildings. No cellar or basement now used for the manufacture of butterine or ice cream shall be so occupied or used unless the proprietor shall comply with the sanitary provisions of this Act."

2. Grinding, Buffing, and Polishing Equipment Sanitation Act—(Blower Act).

A. New Act.

This Act was approved April 16, 1936, and becomes effective July 1, 1936. It repeals Sections 133 to 138, inclusive, of chapter 48, which sections are commonly known as "Blowers upon Metal Polishing Machinery Act." The new Act is temporary legislation and is to remain in effect until July 1, 1937. In explanation of so limiting the life of the Act, it was stated, when the bill was presented, that its provisions will probably be included in rules promulgated by the Industrial Commission, pursuant to the Health and Safety Act, before the expiration date to-wit, July 1, 1937.

Section 1 of the Act provides:

"Any person who operates any mercantile establishment, factory, mill or workshop where grinding, polishing, buffing, scratch brushing or abrasive cutting off wheels, grinding and polishing straps or belts are used, shall, in the area where the dust

or dirt is generated, provide hoods that are connected to exhaust systems which will remove such dust or dirt generated, and such exhaust systems shall be operated continuously during any such operations on aforesaid equipment and such exhaust systems shall be provided with dust arresters, collectors or precipitators to collect the dust or dirt before the air or gases from such exhaust systems are discharged out of doors unless exempted as hereinafter provided."

Certain operations are exempted from the provisions of the Act, apparently because little or no dust would result from such operations. Coal mining and farming are also excepted. This Act contains in detail specifications as to the hoods which must be connected to exhaust systems, the exhaust outlets, the relation of grinding surfaces to outlets, etc. Reference must be made to the text of the Act for these details.

B. Old Act.

The original Act became effective June 1, 1897. It comprised six sections and is repealed in its entirety as of July 1, 1936. The repeal does not, however, affect existing causes of action. On May 12, 1936, the Supreme Court of Illinois construed Section 1 of the old Act in an important decision in the case of *Anton Vogel v. The Johns-Manville Products Corporation*. Section 1 reads as follows:

"That all persons, companies or corporations operating any factory or workshop, where emery wheels or emery belts of any description are used, either solid emery, leather, leather-covered, felt, canvas lined, paper, cotton, or wheels or belts rolled or coated with emery or corundum, or cotton wheels used as huffs, shall provide the same with blowers, or similar apparatus, which shall be placed over, beside or under such wheels or belts in such a manner as to protect the person or persons using the same from particles of the dust produced and caused thereby, and to carry away the dust arising from or thrown off by such wheels or belts while in operation, directly to the outside of the building, or to some receptacle placed so as to receive and confine such dust: Provided, that grinding machines upon which water is used at the point of the grinding contact shall be exempt from the provisions of this act, and provided this act shall not apply to small shops, employing not more than one man in such work."

In that case, Anton Vogel claimed that he suffered from occupational disease, to-wit, siderosis, pneumoconiosis, pulmonary

tuberculosis, and various other pulmonary and bronchial complications, which was caused by the negligence of the defendant. It was alleged that the plaintiff polished, ground, and surfaced various forms of brake-lock containing manganese, silica, asbestos, iron and steel wire, and other metal substances, and that various forms of abrasives were used, including carborundum, silica, and emery. In four counts, the plaintiff charged negligence under the common law. In two counts, the plaintiff charged violation of Section 1 of the Blower Act.

After reaffirming the court's previous decisions that no common law right of action for occupational disease exists in Illinois, the court discussed at length the alleged violation of the Blower Act and held that there can be no recovery for occupational disease resulting from violation of that Act; that recovery for such violation must be limited to accidental injury as distinguished from occupational disease.

It was contended by the plaintiff that the Blower Act is penal in character inasmuch as a penalty for violation is provided in Section 6 thereof, and that consequently a right of action accrues to a person injured through breach of that duty. The court recognized plaintiff's contention as being based upon a familiar rule of law, but refused to expand such rule so as to include right of recovery for occupational disease as distinguished from accidental personal injury.

This reasoning is sufficiently comprehensive to be applicable to the new Blower Act, as well as Section 1 of the old Act which was then being considered.

3. Protection from Poisonous Fumes or Dusts—Revised Statutes, ch. 48, Sec. 139-141.

Section 139 provides:

"That every employer of labor in this State, engaged in the manufacture, repairing or altering of any metals, wares or merchandise which may produce or generate poisonous or noxious fumes or dusts in harmful quantities, such as metal polishing, grinding, plating and dipping of metals in acid solutions or dips, are hereby declared to be especially dangerous to the health of the employees so engaged. Such manufacture, repairing or altering of any metals or merchandise in such processes and places of employment shall be conducted in rooms lying wholly above the surface of the ground."

Authority to enforce this Act is vested in the state factory inspector, and penalties for violation are prescribed ranging from \$25.00 to \$500.00.

Section 142 of chapter 48 is part of the original Act and is effective at present but is repealed by the provisions of another act recently passed by the legislature, the repeal to take effect October 1, 1936. It gives to one injured through violation of the foregoing provisions a cause of action with recovery limited to a maximum of \$25,000.00.

4. Health and Safety Act.

A. Act of 1936.

This Act was approved April 16, 1936, and will become effective July 1, 1936. It repeals a previous act to provide for health, safety, and comfort of employees in factories, mills and workshops, which previous act is included in Sections 143-174 of chapter 48 of the Revised Statutes, but such repeal does not take effect until July 1, 1937.

The basic principle of the new Act is to repose in the Industrial Commission the power to make reasonable rules for protection of the health and safety of employees instead of undertaking to prescribe such rules by detailed statutory provisions.

The Act is made to apply to all employers engaged in any occupation, business, or enterprise with certain named exceptions, which exceptions include farm work, stock raising, and coal mining.

It is provided:

"It shall be the duty of every employer under this Act to provide reasonable protection to the lives, health and safety of all persons employed by such employer. The industrial commission shall, from time to time, make, promulgate and publish such reasonable rules as will effectuate such purposes.

"Such rules shall be clear, plain and intelligible as to those affected thereby and that which is required of them, and each such rule shall be, by its terms, uniform and general in its application wherever the subject matter of such rules shall exist in any business, occupation or enterprise having employees.

"Nothing in this Act shall be construed to grant to the industrial commission the power to make any rule which will require the submission of any plan, specification or other information concerning any proposed installation, alteration, construction, apparatus or equipment, or in any manner regulate the hours of labor of any employee in this State."

To effectuate the purposes of the Act, the Commission is authorized to make rules only for

"(a) The proper sanitation and ventilation of all

places of employment to guard against personal injuries and diseases.

"(b) The arrangement and guarding of machinery and the storing and placing of personal property to guard against personal injuries and diseases.

"(c) The prevention of personal injuries and diseases by contact with any poisonous or deleterious materials, dusts, vapors, gases or fumes.

"(d) The prevention of personal injuries and diseases caused by exposure to artificial atmospheric pressure."

It is then provided that such rules of the Industrial Commission shall have the force and effect of law. The Act contains rather elaborate provisions for its administration. Hearings are provided for those charged with violation. Enforcement is vested in the Department of Labor and fines ranging from \$25.00 to \$200.00 are prescribed for failure or refusal to comply with rules promulgated under the Act.

B. Act of 1909—Revised Statutes, ch. 48, Sections 143-174.

Although repealed as of July 1, 1937, these sections are still a part of the law of Illinois, except those which have been declared unconstitutional. Certain sections in this Act affect industries where dust hazards exist.

Section 150 prohibits any employee taking food into a room in any factory, mill, or workshop where white lead, arsenic or other poisonous substances or injurious or noxious fumes, dusts or gases under harmful conditions are present.

Section 153 provides in considerable detail the quantity of fresh air which must be supplied to workmen in factories and other places of employment.

Section 154 and Section 155 have been held invalid in *Parks v. Libbey-Owens-Ford Glass Company*, 195 N. E. 616.

5. *Chaufeurs—Protection from Dust, Wind, and Weather—ch. 48, Sections 180 and 181.*

Every person owning, operating or controlling automobiles or auto trucks used for delivery of merchandise must keep upon the front of the automobiles or auto trucks a shield and hood as an enclosure to protect chauffeurs from wind, dust, and inclement weather. A penalty of \$50.00 for each and every day of violation is prescribed.

6. *Miners—Revised Statutes, ch. 93.*

This chapter comprises one hundred thirty-seven sections and contains many provisions with respect to the safety of miners.

Section 14, which relates to coal mines, stipulates in lengthy

detail the amount of fresh air which must be provided.

Section 129, which is a part of the Act relating to metal mines, requires that there shall be provided and maintained for every such mine a good and sufficient amount of ventilation for such men and animals as may be employed therein and that adequate quantities of pure air shall circulate through and into all the shafts and working places of such mines.

V. Common Law Liability.

Inasmuch as occupational diseases are not compensable under the Workmen's Compensation Act; and silicosis and possibly other dust ailments are not compensable under the old Occupational Disease Act; and the new Occupational Disease Act does not become effective until October 1, 1936, it becomes important to know what, if any, right of action at common law exists in Illinois for occupational disease, and particularly for silicosis.

The question then is: Does a right of recovery for occupational disease caused by the negligence of the employer exist at common law, in Illinois?

The answer given by the Appellate Court in two cases decided in July, 1935, was "No." Those two cases were:

Joe Sylvester v. The Buda Co., No. 38282; and
Howard McCreery v. Libbey-Owens-Ford Glass Co., No. 38283.

The court wrote a long opinion in the Sylvester case and adopted it in the McCreery case. In that opinion, the common law was traced, and the decision was reached that there is no right of recovery thereunder in Illinois for occupational disease. The case of *McCreery v. Libbey-Owens-Ford Glass Company* was carried into the Supreme Court of Illinois and was decided by that court on May 12, 1936. The decision of the Appellate Court was affirmed.

The plaintiff had alleged that the defendant was engaged in the production of glass and that the processes of manufacture were productive of dust which was harmful to the workmen; that the defendant knew or should have known that the processes were apt to produce the disease which he contracted; that the plaintiff was not informed of the danger; that the defendant negligently failed to provide plaintiff a reasonably safe place in which to work; that there were no "proper" suction fans and no "reasonable" masks or respirators provided; that all of these negligent acts were wilful and wanton; that, as a result, the plaintiff was afflicted with pneumoconiosis.

In the trial court, the defendant moved to dismiss the motion.

having the effect of a demurrer, the ground of the motion being that no statute of Illinois was violated and that the injury complained of was not one for which the employer would be liable at common law, inasmuch as there was no common law right in Illinois to recover for occupational disease. The Supreme Court reviewed and reaffirmed its previous decisions, holding Section 1 of the Occupational Disease Act void and unconstitutional because of indefiniteness and the impossibility of giving it any precise or intelligible application in the circumstances under which it was intended to be applied; that no such sufficient standards were laid down for employers in determining whether or not they came under that Act or in determining what would be reasonable means to be adopted for the protection of employees from occupational disease. The court reaffirmed its previous holding that juries may pass upon what is "reasonable" only where the liability dependent upon such jury finding is one which existed at common law. If the liability is of statutory origin, the common law would afford neither precedent nor aid in interpreting the meaning of such words as "reasonable and approved devices." Hence, the question of whether or not the devices were "reasonable and approved" could not be left to a jury.

Although conceding the long established rule and its common law origin that an employer must furnish his employee a reasonably safe place in which to work, the court held that in Illinois that rule was based upon decisions involving accidental injuries, and not occupational diseases. In this connection, the court said:

"* * * Reflection makes it apparent that this must be so because occupational diseases were unknown to the common law. The weakness of the argument lies in its failure to distinguish between a 'safe' place to work and a 'healthful' or 'sanitary' place in which to work. One searches in vain for any precedent at common law establishing any duties as to healthfulness or sanitation."

"Plaintiff does not complain of the breach of any duty known to the common law * * *. To sustain his claims would not only involve us in judicial legislation, but would require us to establish a rule which we have said even the legislature may not enact. We have held that the legislature is prohibited by constitutional principles from setting up indefinite and uncertain standards for the guidance of employers and we can find no power in the judicial department of government to do that which we have said the legislature may not. It is clear that fundamentally, and of necessity, it can

not be due process of law to impose a burden which is not, and never has been, defined, and the extent of which must, in every case, await the verdict of a jury or the finding of a court. To sustain plaintiff's views would bring about inequality and injustice. Of two men working in the same room and under identical circumstances, one might secure a large verdict and the other none, depending entirely upon an interpretation of law made by a jury based upon rules unknown to the common law and never specifically enacted by any legislature. Not only is this so, but such a verdict might be rendered against an employer even if he had honestly used his best judgment and secured the best of technical advice. Even experts might disagree as to the proper ventilation of rooms of different size and shape, or housing different processes of manufacture. These matters must be settled by specific legislation of such certainty as to be understandable by those who are required to comply with the law, as well as the courts and juries who are to administer it. Without observance of this elementary principle which we have announced in *Parks v. Libbey-Owens-Ford Glass Co.*, *supra*, and *Boshuizen v. Thompson and Taylor Co.*, *supra*, there can be no due process of law nor any protection for either the employer or employee in their respective rights to carry on manufacture and labor therein.

"As we pointed out in the *Boshuizen* case, *supra*, the matter of occupational diseases has neither common law history nor origin. We should add that those diseases were likewise unknown to medical science during the formative period of our common law. Sanitary and health engineering are relatively new sciences which have rapidly produced improvements of great value. An examination of our statutes reveals that the legislature has followed these new sciences and has enacted many provisions for the protection of health and life from hazards either little known, or unheard of, in common law times. Our previous decisions have indicated the limits of judicial authority and we cannot, even in the interest of progress, invade legislative ground, nor, by indirection, reach the same end by approving a complaint which, as a precedent, would deprive litigants of due process of law."

This decision definitely settles the question in Illinois. There is no common law right of action in that state for occupational disease even though the disease be caused by the negligence of the employer.

On the said date, to-wit, May 12, 1936, the Supreme Court of

Illinois rendered another related decision in the case of *Anton Vogel v. The Johns-Manville Products Corp.* In it, recovery was sought for an occupational disease described as siderosis, pneumoconiosis, silicosis, pulmonary tuberculosis, and various other pulmonary and bronchial complications caused by the negligence of the employer. The court denied recovery, citing its decision in the case of *McCreery v. Libbey-Owens-Ford Glass Co.* as authority. For the court's comments in the *Vogel* case with respect to the *Blower Act*, see the discussion of that case under Section IV, 2 B., of this report.

VI. Miscellaneous Matters of Interest.

1. Statutes of Limitations.

Actions for wrongful death must be commenced within one year after the death, and the amount of recovery is limited to \$10,000.00 (Code, ch. 70 Sec. 2).

Actions for personal injury must be commenced within two years after the cause of action accrued (Code, ch. 83, Sec. 15).

Special limitations prescribed under the *Workmen's Compensation Act* and the *Workmen's Occupational Disease Act* have been discussed in previous sections of this chapter.

CHAPTER XVI INDIANA

1. Workmen's Compensation.

1. *Statutes.* Burns *Indiana Statutes*, 1933, Sec. 40-1201 through Sec. 40-1704.

2. *Administration.* The Act is administered by the Industrial Board of Indiana, which is composed of five men, who are appointed by the Governor for terms of four years each. Communications may be addressed to the Board at Indianapolis, Indiana.

3. Scope of the Act.

The preamble includes the recital, among others, that this is an act to require medical care, etc., for employees "injured by accident" and to provide compensation "for injuries and death resulting from such accidents."

Sec. 40-1701 provides that "injury" means "only injury by accident arising out of and in the course of employment and shall not include a disease in any form except as it shall result from the injury."

Under this section, disability from an occupational disease resulting from the inhalation of dust would not be compensable under the Act unless such could be deemed to result from an injury by accident.

4. Court Construction.

The cases which follow indicate that in order for a disability resulting from breathing dust and noxious gases in the course of employment to be compensable under the *Workmen's Compensation Act*, such must be the result of an unexpected or untoward event, not expected or designed. If an employee knows of the dust and its dangerous propensities, the cases hold that he will be precluded from a recovery. However, where there is an unusual, unexpected, fortuitous, or extraordinary occurrence, recovery is possible. An injury need not be produced by violence; it is sufficient if there is produced a lesion or change in any part of the system which injuriously affects any bodily activity or capability.

In *United Paperboard Co. v. Lewis*, 117 N. E. 276 (Court of Appeals, 1917), a pipe broke dumping hot pulp into the defendant's basement. The plaintiff had to remove the same with hot water applied through a hose. On the way home he chilled and afterwards developed nephritis. Compensation was granted on the ground that the disability was the result of an accident within the meaning of the Act.

In *Standard Cabinet Company v. Landgrave*, 132 N. E. 661 (Court of Appeals, 1921), an award allowing compensation for housemaid's knee was affirmed. Plaintiff was employed for nineteen years as a carpenter. At the time of the injury he had been polishing and scraping floors for six or seven days, working on his knees. The court held that such was an injury by accident, since it was an unlooked for mishap or untoward event, not expected or designed.

In *General American Tank Car Corp. v. Weirick*, 133 N. E. 391 (Appellate Court, 1921), plaintiff was disabled by inhaling fumes and gases arising from molten metal. There is no statement as to the length of time during which the plaintiff was exposed to such gases nor as to whether he had inhaled an excessive amount of such at any particular time. However, the court affirmed an award granting compensation to the plaintiff because he had not anticipated or designed the serious consequences resulting in his death. This case is vague in its exact holding due to the lack of sufficient facts. Later cases cited herein clarify the Indiana law in comparable situations.

In *Wasmuth-Endicott Co. v. Karst*, 133 N. E. 609 (Appellate Court, 1922), the plaintiff developed typhoid fever as a result of drinking germ polluted water furnished him by his employer. Compensation was granted, the court saying that an injury "need not be produced by violence, as our statute, unlike those of some other states does not so provide. It suffices in that regard, whatever the accident may have been, if it produces a lesion or change in any part of the system which injuriously affects any bodily activity or capability."

In *Moore v. Service Motor Truck Co.*, 80 Ind. App. 668, 142 N. E. 19 (1924), plaintiff had been in the employ of the defendant company for three or four years as supervisor of the emery wheels in the grinding department. His duties required him to grind raw castings and to polish metal parts on an emery wheel and buffing machine. These operations impregnated the air with emery and metallic dust, which was breathed by the plaintiff and passed through his mouth and into his stomach, bowels, bronchial tubes, and lungs, causing injury thereto. No large or unusual quantities of dust entered his body at any one time. The court denied compensation on the ground that the disability was not the result of an injury by accident. The court said in part:

"* * * He" (the plaintiff) "knew that the air in which he worked was impregnated with emery and

metallic dust; that it was passing into his lungs and bowels; that it made others sick after they had worked in it for a time; that it was having an injurious effect on him from day to day, and on that account sought to have his work changed; that he was gradually growing worse—in fact so much so that he had to exert force in order to arouse enough energy to perform his duties. Such facts are sufficient to warrant an inference that he must have known that if he continued to work in such dust-laden air that he would finally reach a stage of disability. * * *

In *Brewer v. Veederburg Paver Co.*, 177 N. E. 74 (Appellate Court, 1931), a claim was made for disability resulting from breathing gas and smoke while working at a brick kiln. The claimant had worked for the defendant under conditions similar to those on the day of the injury for almost a year; he had worked in a brick yard for twelve or fourteen years; the smoke and gas were visible to the claimant's sight on previous days as well as the day of injury; and the employee knew that the gas and smoke had made others sick. There was no evidence that smoke and gas were thrown into the room where he worked in any unexpected manner or that the smoke or gas entered his body in any unexpected manner or in any unusual quantity.

The court denied compensation on the ground that this was not an injury by accident within the meaning of the Act, following *Moore v. Service Motor Truck Co.*, *supra*.

In *Buenker v. Union Furniture Co.*, 181 N. E. 294 (Appellate Court, 1932), the decedent had been employed as foreman in a finishing room, where furniture was decorated with paint and gilt. The deceased sometimes mixed and prepared the gilt, helping in the work of decorating the furniture and often getting paint and gilt on his clothing and hands. While in apparent good health, he suddenly took ill and died four days later. There was credible testimony to the effect that he died from painter's colic, which is a metal poisoning. Compensation was denied because

"A careful examination of the record fails to disclose any evidence that anything unusual, unexpected, or extraordinary occurred on the day that deceased became sick, and it affirmatively appears that the finishing materials being used on that day were the same kind as previously used in decorating the furniture and that the working conditions were in no way different from what they had previously been. There is an entire lack of evidence to show

that on the day in question deceased misused or applied any paints or gilt, or that he inadvertently, while peeling and eating apples or chewing tobacco, took internally any quantity of any material used in his work."

See also *General Printing Co. v. Umbach*, 195 N. E. 281 (Court of Appeals, 1935), *infra*.

II. Employers' Liability Act.

Sec. 40-1101 provides that an employer of more than five persons shall be liable for injury to or death of an employee in the course of his employment where such results from the negligence of the employer, his agent, employee, or officers, or by reason of a defect, mismanagement, or insufficiency due to his or their negligence. Besides creating the statutory cause of action, this section abrogates the defense of the negligence of a fellow servant.

Sec. 40-1102 limits the defense of contributory negligence. The burden of proving a lack of due care on the part of the employee is placed upon the defendant. It further provides that an employee shall not be guilty of contributory negligence by reason of an assumption of risk where the employer violates a statute, ordinance, or rule or regulation made by proper commission or officer; that it is no defense that dangers inherent or apparent in the employment contributed to the injury; and finally that an employee is not guilty of contributory negligence where the injury was received while acting in obedience to an order of the employer or one in authority, although such direction was contrary to previous orders made by the employer.

Sec. 40-1103 deals with the defense of assumption of risk. It provides that an employee does not assume the risks of the employment where the employer's violation of a statute, ordinance, rule, or regulation contributed to the injury or death, or where the injury complained of resulted from obedience to an order of the employer or one in authority, although such order deviated from previous ones made by the employer. An employee does not assume the risk of any defect in the place of work, tools or appliances furnished by the employer where such defect was previously known to the employer or should have been known by him in the exercise of ordinary care in time to make repairs or discontinue the use thereof. The burden of proving the employer's lack of knowledge or that he was not chargeable with knowledge thereof in time to make repairs or discontinue the use of such place, tool, or appliance is placed upon the defendant.

Sec. 40-1108 provides that no action shall be maintained under this Act unless the same is commenced within two years from the date the cause of action accrued.

These sections remain in effect and were not repealed by the Workmen's Compensation Act.

In the recent case of *General Printing Co. v. Umbach*, 195 N. E. 281 (Court of Appeals, 1935), there was a common law action predicated upon the Employer's Liability Act where death resulted from lead poisoning. The plaintiff alleged that the defendant was negligent in failing to provide proper ventilation, as required by statute, and that plaintiff did not know of the dangerous condition. Plaintiff did not allege or show that any unusual, unexpected, or untoward event had occurred. Both parties had accepted the provisions of the Workmen's Compensation Act.

The court affirmed a decision in favor of the plaintiff, upholding the jury's finding that an occupational disease was the proximate cause of the death and also the ruling of the lower court that the suit was properly brought in the court of law.

III. General Statutes.

1. Safety and Sanitary Regulations.

Sec. 40-1005 provides:

"* * * Exhaust fans of sufficient power shall be provided for the purpose of carrying off dust from emery wheels and grindstones and dust-creating machinery from establishments where used. * * *

This section was construed in *Muncie Pulp Co. v. Hacker*, 37 Ind. App. 194, 76 N. E. 770 (1906); *National Drill Co. v. Myers*, 40 Ind. App. 322, 81 N. E. 1103 (1907); and *Indianapolis Foundry Co. v. Bradley*, 45 Ind. App. 530, 89 N. E. 505 (1909), in which cases eye injuries resulted from failure to install proper exhaust fans to carry off the emery dust.

The conclusion from these cases is that the statute imposed a specific obligation on the employer, and a failure to comply therewith constitutes a clear breach of a statutory duty owed to an employee. The plaintiff, to recover, has the burden of showing that he is the servant of the defendant; that he operates a dust creating machine which is not equipped with a fan; that it is practical to so equip it; and that he has sustained an injury from the dust created. In such a suit the defense of assumed risk does not apply, but the defense of contributory negligence is for the jury.

These cases were decided before enactment of the Work-

men's Compensation Act, but the law therein announced would still apply if "occupational disease" were the disability complained of, as it is not covered by the Workmen's Compensation Act; likewise, these decisions would govern if "injury by accident" were involved and the employer had elected not to be governed by that Act.

Though each of these cases was based upon an injury to the eyes or face from flying particles of emery dust, they indicate a right to recover for injury caused by the inhalation of such dust. The court, in *Jenney Electric Mfg. Co. v. Flannery*, 53 Ind. App. 397, 98 N. E. 424 (1912), specifically declares:

"No doubt, as contended by the appellee, the statute was intended to provide a means for carrying away the dust which would otherwise float in the air and produce injurious results to those who breathe it; * * *

It follows that a failure to comply with this section may well be the basis of an action for injury to an employee caused by the inhalation of dust in the course of his employment. See *General Printing Co. v. Umbach*, *supra*.

Sec. 40-1011 provides that where an employee is required to work in an enclosed structure in which there may be accumulations of "dangerous, noxious or deleterious gases," it is the duty of the employer to supply the employee with serviceable gas masks to be worn while at work.

Sec. 40-1012 provides that a failure or refusal to comply with the above section constitutes a misdemeanor, for which such employer shall be fined from \$50.00 to \$500.00. It also places the duty of administering the provisions of this act upon the Industrial Board.

Sec. 40-1013 requires a proper amount of air and ventilation to be provided workmen.

Sec. 40-1017 makes a violation of any of these sections a misdemeanor and fixes a penalty.

2. Coal Mines—General Provisions.

Sec. 46-713 fixes the amount of ventilation for mines. Subdivision (k) provides:

"In case the roadways or entries of any mine are so dry that the air becomes charged with dust, such roadways or entries shall be regularly and thoroughly sprinkled. And it shall be the duty of the

chief inspector to see that this provision is carried out."

3. Buildings and Safety Regulations.

Sec. 20-304 provides:

"* * * and, generally it shall be the duty of all owners, managers, operators, contractors, subcontractors, and all other persons having charge of, or responsible for, any work, mechanism, machinery, appliance, building, factory, plant, means, employment or business of whatsoever nature involving risk or danger to employees or to the public, to use every device, care and precaution which it is practical and possible to use for the protection and safety of life, limb and health, limited only by the necessity for preserving the reasonable efficiency of such structure, * * *, without regard to additional cost of suitable materials or safety appliances, or safe conditions or appliances, the first concern being safety to life, limb and health."

IV. Common Law.

Although no case has been found determining whether an action at common law lies for disability resulting from an occupational disease caused by the inhalation of dust, it is reasonable to assume that Indiana will follow the modern trend of the decisions and hold that such an action will lie. It will be necessary to prove negligence on the part of the employer; and in the absence of the applicability of the Workmen's Compensation Act and the Employers' Liability Act, the three common law defenses of contributory negligence, assumed risk, and the negligence of fellow servant would seem to be available to the employer.

The Workmen's Compensation Act is elective both to employers and employees coming within its terms, but there is a presumption of acceptance on the part of both in the absence of notice to the contrary. Where the employer elects not to operate under the Act and where both employer and employee so elect, the defenses of assumption of risk, negligence of fellow servant, and contributory negligence are not available to the employer in a common law action against him for personal injury or death within the meaning of those terms as used in the Act. Where only the employee elects not to be bound, such defenses are available to the employer.

Sec. 40-1206 of the Workmen's Compensation Act provides:

"The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other

rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death."

A reasonable construction of this section is that the statutory rights and remedies are exclusive only with respect to "personal injury or death by accident"; and that where the injury in question is not within the Act, the employee may have recourse to his common law remedy, as supplemented by the Employers' Liability Act. *General Printing Co. v. Umbach, supra.*

V. Miscellaneous Matters of Interest.

1. Statute of Limitations.

By Sec. 2-601, for injuries to person, an action must be brought within two years of the time the cause of action accrued and not thereafter. By Sec. 2-607, in the case of death before the expiration of the time limited for the action the cause of action shall survive and may be brought at any time after the expiration of the time limited within eighteen months after the death of such person.

CHAPTER XVII

IOWA

I. Workmen's Compensation Act.

1. **Statutes.** Code of Iowa, 1935, Secs. 1361-1481.

2. **Administration.** The Act is administered by a single Industrial Commissioner, who is appointed by the Governor with the approval of the Senate for a term of six years. Each hearing is before a Board of Arbitration, which consists of three persons, one of whom is the Industrial Commissioner; the other two are named respectively by the parties to the action. Communications may be addressed to the Industrial Commissioner at Des Moines, Iowa.

3. Scope of the Act—Statutory Provisions.

A. Who and What Are Covered?

This Act is exclusive, compulsory and obligatory where the state, county, municipal corporation, school district or city is employer.

The Act does not apply to domestic servants, casual employees or agricultural employees.

The Act applies to all other employers, but either the employer or the employee may elect not to be bound by its provisions. In the absence of election not to be so bound, it is conclusively presumed, except as otherwise provided in the Act, that every employer has elected.

"* * * to provide, secure and pay compensation * * * for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury." (Bold face type not in text) (Sec. 1363)

Sec. 1421 includes the following definition:

"The words 'injury' or 'personal injury' shall be construed as follows:

"a. They shall include death resulting from personal injury.

"b. They shall not include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee, or because of his employment.

"c. They shall not include a disease unless it shall result from the injury."

Occupational disease is not mentioned in the Act, and it is therefore neither specifically covered nor excluded. The extent to which disease is compensable depends upon court construction of the word "injury." It is to be noted that the statutory definition does not limit "injury" to the results of an accident and that it does not require physical violence as the cause of the injury. It is necessary to study the decisions of the Iowa courts in order to determine to what extent disease has been held compensable, and also to predict what constructions may be adopted in the future in view of the development taking place in the law with respect to occupational disease. A further discussion is found herein under "Court Construction."

B. Exclusiveness of the Act.

Inasmuch as disease is compensable to some extent, it is pertinent to inquire whether or not employers and employees are limited to the rights and liabilities prescribed in the Act and to what extent, if at all, there is a right of election to pursue the common law right of damages.

Either employer or employee may reject the terms of the Act. In the absence of notice of election to so reject, there is implied acceptance of the Act on the part of both the employer and the employee (Sec. 1377). In such case, to-wit, where both employer and employee operate under the Act, but in such case only, the employee is limited to his right of compensation under the Act and is barred from a common law right of action with respect to any injury which is compensable (Sec. 1380 as construed in *Balen v. Golfax Coal Co.*, 183 Iowa 1198, 168 N. W. 246 (1918)).

If both employer and employee elect to reject the Act, "the liability of the employer shall be the same as though the employee had not rejected the provisions hereof" (Sec. 1374). We understand this to mean that the employer would be denied the common law defenses.

If the employee rejects the Act, and the employer does not, the employer may avail himself of all common law defenses in a common law action brought by the employee, except that the employer is denied the defense of assumed risk, where the action is based upon violation of a statute requiring the maintenance of safety devices, appliances or equipment (Sec. 1367 and 1368).

If the employer rejects the Act, he is denied, in a common law action, the usual common law defenses of assumption of risk, fellow servant, and contributory negligence (Sec. 1375).

A very important section—one which is of serious significance in actions growing out of exposure to dangerous working conditions—is Sec. 1379, which provides:

"In actions by an employee against an employer for personal injury sustained, arising out of and in the course of the employment, when the employer has rejected the provisions of this chapter, the following provisions shall apply:

"1. It shall be presumed:

"a. That the injury to the employee was the direct result and growing out of the negligence of the employer.

"b. That such negligence was the proximate cause of the injury.

"2. In such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence."

Court constructions of this statute are noted in a subsequent section of this chapter.

The rights and liabilities of the Iowa Workmen's Compensation Act are not held to be exclusive with respect to injuries which are of such character as not to be compensable under the Act. In other words, if an injury is not compensable but the circumstances are such that at common law, in the absence of the Act, a right of action would exist, that right would continue to exist in Iowa, notwithstanding the Workmen's Compensation Act. This is important because of the uncertainty under the court decisions of this state as to when a disease results from an "injury" so as to be compensable. If, in a given case, the disease were held not compensable, but it could be established that it resulted from the employer's negligence, the common law right of recovery therefor would exist.

4. Court Construction.

A. Definition of "Injury."

Gay v. Hocking Coal Co., 184 Iowa 949, 169 N. W. 360 (1918).

This was not a proceeding before the Industrial Commissioner. The employer had elected to reject the Act and the action was brought under the common law.

Plaintiff's health was seriously impaired through breathing air in the defendant's mine which had become foul and full of damps and other impurities. He was totally disabled for eight months, and partially disabled for a much longer period.

One defense of the employer was that the plaintiff suffered from an "occupational disease," and the trial court charged at

length on that question and on the right to recover for "occupational disease" under the Compensation Act.

The reviewing court held that, since the employer had rejected the Workmen's Compensation Act, the plaintiff could maintain his action at common law without reference to whether or not occupational disease was compensable. The court states the questions at issue thus:

"Was the defendant negligent with respect to the ventilation of the mine where plaintiff was employed? If defendant was thus negligent, did the plaintiff thereby sustain the injury of which he complains? If these two facts be established, defendant's liability to respond in damages is not open to question." (Bold face type not in text)

Again the Court says:

"If the employer fails to provide a reasonably safe place to work, or fails to observe the specific requirements of the statute with respect thereto, and as a result of such neglect the employee is injured, the liability of such employer cannot be avoided by calling such injury an 'occupational disease', or by showing that disease of that nature is often the accompaniment or result of such employment, even when all due care has been exercised by the employer."

This comment clearly indicates that, in the mind of the court, an "injury" might result from unhealthy working conditions negligently allowed to exist, even though the "injury" might ordinarily be thought of as the disease.

The court so defines "occupational disease" as to limit it to that class of diseases which are normally incident to a particular occupation, and not the result of exposure to conditions negligently maintained. It clearly differentiates between an "occupational disease" so defined and disease caused or brought about by the employer's failure in his duty to provide a safe place to work.

The whole tenor of this decision is to recognize a diseased condition due to the employer's negligence as an "injury." There was no accident, in the commonly accepted sense, but merely disability resulting from breathing polluted air. Nevertheless, the court said:

"A wrongful injury which operates to destroy or undermine or impair the health of another is no less actionable than is a wrong from which the injured person sustains wounds or bruises or broken bones."

And the court further says:

"* * * if defendant did fail in its duty in this respect (to expel the gas from the mines) and plaintiff was thereby physically overcome or disabled to a degree causing him to suffer injury or loss, defendant's liability is neither avoided nor lessened by reason of the fact that plaintiff sustained no wound or bruise or other hurt of a traumatic character or origin."

In *Hanson v. Dickinson*, 188 Iowa 728, 176 N. W. 823 (1920), the court considered a claim under the Workmen's Compensation Act for 44 weeks' disability, which resulted from a bruise on the leg made by a hammer coupled with pre-existing blood infection which resulted in a gonorrheal arthritis. The court held that one predisposed to disease which is aggravated or accelerated by a negligent injury, is entitled to recover damages necessarily resulting from such aggravation or acceleration. The court remarks that "personal injuries" as used in the Workmen's Compensation Act is of much broader significance than the "personal injury by accident" as used in many such acts. The following statement of the court, though probably dictum, is interesting.

"The manifest design of the General Assembly in providing that the term 'personal injuries' should not include a disease was to eliminate occupational diseases; that is, those, which are incidental to or results from the occupation in which the employee is engaged. In a sense these may be said to 'arise out of and in the course of the employment,' but usually are covered by increased compensation of the employee."

In this comment, the court appears to have had in mind "occupational disease" as defined in definition No. 1 in chapter 3 of this survey, to-wit, disease which is normally incident to a particular occupation, and which could not have been prevented by the exercise of reasonable care. The statement should not be taken as authority that disease due to conditions negligently allowed to exist is not compensable.

The Workmen's Compensation Act has been construed and applied many times by the courts of Iowa, and a liberal attitude is manifest both by the Commission and the courts in finding that the condition of disease complained of results from injury. To illustrate, in *Farrow v. What Cheer Clay Products Co.*, 200 N. W. 625 (1924), diseased condition of the heart of long standing was accelerated by injury; and in *Frase*

v. McClelland Co., 205 N. W. 737 (1925), tuberculosis resulted from an accidental blow on the chest. In both cases, compensation was allowed and confirmed.

These views were reaffirmed in *Dille v. Plainview Coal Co.*, 250 N. W. 607 (1933), where compensation was awarded. The deceased employee had been engaged in coal mining for 35 years. He worked for the defendant from sometime in September till October 22, 1929, when he collapsed. Gases had been permitted to accumulate in the mine and they threw a strain upon his heart which was in weakened condition, causing acute dilation and his collapse. The court found that the evidence warranted the Commissioner in finding that the condition of the employee's heart was "not due to an employment which ordinarily produces such condition, but was caused by his working for only a few weeks under conditions that were not such as were usually and ordinarily found in such employment." The court found that the acute dilation of the heart suffered by the employee "was not an occupational disease but was an injury arising out of and in the course of his employment." Again in 1934, in the case of *Almquist v. Sheandoah Nurseries*, 254 N. W. 35, similar views were announced in awarding compensation where death was caused by perforation of the stomach by ulcers. In a long opinion, the court discusses personal injury comprehensively. It says in part:

"* * * While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. * * *

"A personal injury contemplated by the Iowa Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. * * * The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body. * * *

(Bold face type not in text)

The court then points out that the phraseology of the Iowa Act differs from that of many acts, and that Iowa is committed to the proposition that personal injury contemplated by the

Act need not be one caused by an accident.

From the foregoing decisions, we venture the following conclusions:

1. That damage to the lungs from breathing dust or poison-laden air is an injury within the Workmen's Compensation Act.
2. That tuberculosis or other complications following such "injury" is a disease resulting from injury within the terms of the Act.
3. That "occupational disease" is limited to diseases naturally resulting from the employment, and not resulting from unhealthy conditions negligently permitted to exist.

By reason of these decisions, therefore, there is every probability that silicosis and other dust diseases would be held compensable. Furthermore, as pointed out subsequently in this chapter, disease due to negligence of the employer may be made the basis of a common law action if it is not compensable under the Workmen's Compensation Act.

B. Exclusiveness of the Act.

As heretofore stated, the rights under the Act are exclusive only where both employer and employee elect to operate under it.

Balen v. Colfax, 183 Iowa 1198,
168 N. W. 246 (1918).

C. Effect of Employer's Rejection.

Sec. 1379, hereinabove quoted, has been construed and applied in many cases, and it is held that the employee bringing an action against an employer who has rejected the Act need only show that he was employed by the defendant and that the injury arose out of and in the course of his employment. If nothing further is shown, the presumptions under this section warrant a judgment against the employer.

Bulkovitch v. Centerville Block Coal Co.,
188 Iowa 1176, 177 N. W. 479 (1920);
Mitchell v. Mystic Coal Co.,
189 Iowa 1018, 179 N. W. 428 (1920).

This section shifts the burden of proof to the defendant employer to prove that he exercised due care. In other words, the employee is not required to show negligence on the part of the employer. This statute therefore is of great importance in any case involving conditions such as those which produce silicosis or other dust ailments.

II. Other Statutes.

1. Chapter 73, Health and Safety Appliances.

"1489. Blowers and pipes for dust. All persons, companies, or corporations operating any factory or workshop where emery wheels or emery belts of any description, or tumbling barrels used for tumbling or polishing castings, are used, shall provide the same with blowers and pipes of sufficient capacity, placed in such a manner as to protect the person or persons using same from the particles of dust produced or caused thereby, and to carry away said particles of dust arising from or thrown off such wheels, belts, and tumbling barrels, while in operation, directly to the outside of the building, or to some receptacle placed so as to receive or confine such particles of dust; but grinding machines upon which water is used at the point of grinding contact, and small emery wheels which are used temporarily for tool grinding, are not included within the provisions of this section, and the shops employing not more than one man at such work may, in the discretion of the labor commissioner, be exempt from the provisions hereof."

"1490. Pipes and flues for gases. Any factory, workshop, printshop, or other place where molten metal or other material which gives off deleterious gases or fumes is kept or used shall be equipped with pipes or flues so arranged as to give easy escape to such gases or fumes into the open air, or provided with other adequate ventilators."

Sec. 1494 provides that any violation of these sections constitutes misdemeanor and also provides a penalty. A failure on the part of the employer to provide equipment, such as called for by these sections, would undoubtedly constitute negligence which could be the basis of a recovery for injury or death resulting from such failure.

"1495. Assumption of risks. In all cases where the property, works, machinery, or appliances of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, work, machinery, or appliances to furnish reasonably safe machinery, appliances, or place to work, the employee shall not be deemed to have assumed the risk, by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employee may have had knowledge when the employer had knowledge of such defect, except when in the usual and ordinary course of his employment it is the duty of such employee to make repairs, or remedy the defects. Nor shall the em-

ployee under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work; but this statute shall not be construed so as to include such risks as are incident to the employment; and no contract which restricts liability hereunder shall be legal or binding."

Under this section the defense of assumption of risks has not been taken entirely away from the employer, but its availability is considerably diminished.

2. Negligence—Burden of Proof.

Sec. 11210 provides:

"In all actions brought in the courts of this state to recover damages caused by the negligence of the defendant, the burden of proving contributory negligence shall rest upon the defendant. This section shall only apply to actions brought by an employee against his or her employer, or by a passenger against a common carrier, and in such case contributory negligence may be pleaded in mitigation of damages."

3. Mining.

A. Coal Mines.

"1272. Ventilation. The operator of any mine shall provide and maintain an amount of ventilation of not less than one hundred cubic feet of air per minute for each person employed in the mine and not less than five hundred cubic feet of air per minute for each animal used therein, which shall be so circulated throughout the mine as to dilute, render harmless, and expel all noxious and poisonous gases in all working parts of the mine. * * * (Bold face type not in text)"

Sec. 1273 provides for the measurements of air currents in mines, and also requires that a record of such measurements be kept at the office of the mine and a report made each month to the inspector of the district.

Sec. 1274 provides for air current splits in the mine and fixes the number of employees which may work at any one time on each split.

"1276. Unhealthful conditions. When the mine inspector finds the air insufficient or the employees working under unsafe or improper health conditions, he shall at once give notice to the mine operator,

and upon failure to make the necessary changes within such time as the inspector shall fix, such inspector shall order the employees, except such as may be necessary to correct the defect and make the repairs, to cease work and remain out of the mine until such conditions are corrected."

Sec. 1272 was the basis of action in *Gay v. Hocking Coal Co.*, 184 Iowa 949, 169 N. W. 360 (1918), hereinabove cited. The court held that this statute placed upon the mine operator a positive duty to ventilate all working parts of the mine, so as to render harmless and expel all noxious and poisonous gases; that failure to comply with the statute was negligence per se; and that recovery could be had for damage to health resulting from breathing the gas and impure air consequently left in the mine.

Although these statutes do not specifically mention a dust hazard, they seem to be broad enough to be applicable, in the event of a suit by a mine employee against a mine operator for disability resulting from breathing dust when such had not been expelled from the mine.

B. Gypsum Mines.

"1342. Ventilation. The owner or person in charge of any mine shall provide and maintain, whether the mine be operated by shaft, slope, or drift, an amount of ventilation of not less than one hundred cubic feet of air per minute for each person, nor less than five hundred cubic feet of air per minute for each mule or horse employed therein, which shall be so circulated throughout the mines as to dilute, render harmless, and expel all noxious and poisonous gases in all working parts of the same."

"1343. Air measurement. In no case shall the air current be a greater distance than sixty feet from the working face, except when making crosscuts in entries for air courses; then, in that case, the distance shall not be greater than seventy feet; but the state mine inspector may, in writing, grant permission to go beyond the limit herein mentioned, when the conditions are such in a special case as to require it."

"1344. Insufficient air. When the mine inspector shall find the air insufficient, or men working under unsafe conditions, he shall at once give notice to the mine owner or his agent or person in charge, and upon the failure to make the necessary changes within a reasonable time, to be fixed by him, he may order the men out, to remain out until the mine is put in proper condition."

III. Common Law Liability.

Although we can cite no cases directly in point, it is our opinion that, prior to the enactment of the Workmen's Compensation Act, a common law right of action existed in this state for a diseased condition caused by the employer's negligently failing to provide a safe place to work. That right has been modified and limited by the Workmen's Compensation Act, but it would still exist. This conclusion, we believe, is supported by the reasoning of the court in *Canfield v. Iowa Dairy Separator Co.*, 134 N. W. 434 (1915), and in *Gay v. Hocking Coal Co.*, 184 Iowa 949, 169 N. W. 363 (1918).

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations.

Under the Workmen's Compensation Act, notice to the employer is required within fifteen days after the injury, but this time is extended under certain circumstances. If the employer is not notified within ninety days, or does not otherwise obtain knowledge of the injury within that time, no compensation is allowed. Proceedings for compensation must be commenced within two years from the date of the injury. (Secs. 1383-1386).

Actions at common law must be brought within two years from the time the cause of action accrues. If the person having a cause of action dies within one year next previous to the expiration of the limitation (the two-year period), the time is extended to one full year after such death.

2. Surveys.

No official surveys of dust hazards or silicosis have been made in this state.

CHAPTER XVIII

KANSAS

1. Workmen's Compensation Act.

2. Statutes. Revised Statutes of Kansas, 1923, Sec. 44-501 through Sec. 44-565, Sec. 74-704 through Sec. 74-709.

3. Administration. The Act is administered by the Commission of Labor and Industry, a board of three, appointed by the Governor for terms of four years each. The Governor appoints one member as chairman, which chairman has active charge of the administration of the Workmen's Compensation Act. Communications may be addressed to the Commission at Topeka, Kansas.

4. Scope of the Act. By Sec. 44-501 of the Workmen's Compensation Act, only personal injuries by accident are compensable therein. Diseases in general, therefore, are not compensable under the Act.

5. Court Construction. Although occupational diseases in general are not compensable under the Act, if an accident accelerates a disease, the compensation is augmented by the physical condition due to the disease. Two cases in particular indicate the liberality of construction adopted by the Kansas courts.

In *Gilliland v. Cement Co.*, 104 Kan. 771, 180 P. 793 (1919), the deceased employee worked in defendant's plant for a period of three years in the sacking department where there was always a great deal of dust present. He was then transferred to the quarries, where he was employed in breaking rock with the use of a heavy sledge. Death resulted suddenly from a hemorrhage with blood flowing from his mouth and nose. Shortly before he was seen beating a rock with a sledge. The court, in granting compensation on the ground that the death was the result of an accident, said:

"* * * An 'accident' is simply an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, * * *

"The defendant insists that the workman died of disease: that is, the injury did not arise out of the employment. The question was one of fact, and should have been submitted to the jury. It is not material that the workman's blood vessels were weakened by disease, or that he was predisposed to hemorrhage because, for example, he had breathed

the dust of the sacking department for three years. The statute establishes no standard of health for workmen, entitling them or their dependents to compensation, and if the added factor of physical exertion in the employment were required to effect the lesion, and did so, the injury arose out of the employment. That the injury occurred in that way, and is referable to a definite time, place, and circumstance, is indicated by the workman's apparent good health and strength, the suddenness and profusion of the hemorrhage, the absence of previous extravasation of blood, and other circumstances."

In Riggs v. Ash Grove Lime & Portland Cement Co., 127 Kan. 91, 272 P. 153 (1928), an employee had worked for many years in the employ of the defendant, during which time he breathed cement dust and gases to such an extent as to dis-ease and weaken the lungs and arteries surrounding his heart. While in such a condition, as a part of his duties, he was com-pelled to climb a ladder. The exertion overtaxed him; the arteries of his heart failed to function; and death occurred.

The defendant contended that such does not constitute an in-jury by accident arising out of the employment, since there was no time, place, or circumstance where the thing called an ac-cident occurred. The court, however, granted compensation on the ground that, where an accident contributes to or influences the progress of any existing disease, causing disability or death, such is sufficient to justify an award under the Act.

Where, then, an employee has been weakened by dust-laden air and in the course of his employment some exertion over-taxes him and results in disability, such appears to be compen-sable; and the fact that such exertion resulted from doing work in the manner customary and habitual to the employment does not prevent recovery under the Act.

In the following cases, however, the disability was acquired gradually, and there was no "unexpected or untoward event", and compensation was denied:

In Taylor v. Swift & Co., 114 Kan. 431, 219 P. 516 (1923), a workman was engaged in working in and out of a meat-cooling room. The room inside was cold, while the weather outside was hot. This alternating heat and cold brought on a pain in the spine, which evidenced itself when lifting the meat. In denying compensation on the ground that plaintiff's disability did not arise from an accident within the meaning of the Act, the court said:

"* * * Here there was no accident. The exposure caused by working in and out of a cooler or re-

frigerated wareroom is undoubtedly hard on the hu-man constitution; it may wear down and gradually weaken a workman's powers of endurance and rend-er him more liable to various diseases, including pos-sibly transverse myelitis as contended for in this case by plaintiff, but such work and such exposure, al-though regrettable consequences flow therefrom, do not constitute an industrial accident within the meaning of the Compensation Act. * * *

In Chop v. Swift & Co., 233 P. 800 (1925), the claimant was employed in carrying links of cold sausage from one part of the defendant's plant to another. She carried the links draped on her left arm, taking them to a carrier. The sausages were very cold and the temperature of the room was very low, so that after a time, she felt a numbness and also pain in her arm. This finally resulted in what physicians termed as wrist drop due to the exposure to the cold. The court, in holding that the injury could not be regarded as an accidental one within the meaning of the Act, said:

"We think the trial court rightly concluded that the injury was not compensable under the Work-men's Compensation Law. The act does not provide for occupational diseases, but only for injuries by accident sustained in the course of employment and arising out of it. Was there an accident, or was the injury the result of an accident? There was no force or bodily injury of accidental origin. Ac-cording to the testimony, the injury was the conse-quence of coldness which resulted in exhaustion and low vitality culminating in the disease of paralysis. It brought on a weakened condition of resistance to disease and was somewhat like catching cold, something which results from exposure and fin-ally develops into a disease and might occur in any case where there was exposure. It was not an un-expected and untoward event, but, as the phys-icians said, was something which may follow ex-posure and render the employee liable to diseases like pneumonia, neuritis, or paralysis, and cannot be re-garded as an accidental injury as distinguished from a disease. * * *

Attention is called to the case of **Echord v. Rush**, which is dis-cussed in Section III of this chapter.

II. Other Statutes.

By Sec. 74-707, one member of the Commission of Labor and Industry is designated by the Governor to act as Commissioner of Labor. He has active charge of factory inspection, state mine inspection, state bureau of free employment and super-vision of laws pertaining to women and children in industry,

full jurisdiction over all of which is vested in the Commission of Labor and Industry.

By Secs. 44-601a and 44-636 read together, the Commission of Labor and Industry is given full power of inspection of workshops, factories and all places where labor is performed with respect to ventilation and all conditions affecting the safety of workmen and to make rules and issue orders with regard thereto. Failure to comply constitutes a misdemeanor, punishable by fine or imprisonment. No mention is made of dust conditions but the statute is sufficiently broad to cover that subject. No general rules of this Commission are available.

Secs. 49-204, 205, 209, and 216 deal with the subject of mine ventilation, particularly with respect to protection against gas and fire damp. Sec. 49-251 requires certain precautions, including sprinkling to prevent accumulation of coal dust "or other inflammable ingredients." These sections are administered by the Commission of Labor and Industry.

III. Common Law Liability.
Sec. 44-501, which is the first section of the Workmen's Compensation Act, and which provides for compensation for "personal injury by accident", also provides:

"Save as herein provided, no such employer shall be liable for any injury for which compensation is recoverable under this act."

This provision has been so construed as not to deny an employee his common law right of action, except where compensation is provided for the injury.

The existence of a common law right of action for a diseased condition due to negligence of the employer, and that it continues to exist in view of the fact that compensation is not provided therefor, is indicated by the following decisions:

**Echord v. Rush, 124 Kan. 521,
261 P. 820 (1927).**

This was an action at common law for wrongful death based upon the failure to provide safety provisions in a mine, as required by statute, as a result of which poisonous gases accumulated which were inhaled by the deceased day by day over a considerable period of time.

An application for compensation had previously been denied by the Commission, on the ground that the death was not the result of an injury by accident. The court held that the disallowance of the claim by the Commission did not bar this action, inasmuch as it is based upon negligence of the de-

endant resulting in an injury not compensable under the Workmen's Compensation Act. Judgment for the plaintiff was therefore affirmed.

**Pritchman v. Chilwood Battery Co.,
134 Kan. 727, 8P (2d) 368 (1932).**

This action was brought on behalf of a boy seventeen years of age, who had worked six months in a battery repair shop, in which the air was heavily laden with poisonous dust and from which lead poisoning resulted. The negligence charged by the plaintiff was failure to furnish a safe place to work and failure to warn him of dangers of which he had no knowledge. The court found that lead poisoning was a slow, gradual and insidious process; that the plaintiff was not acquainted with the chemicals or lead poisoning; and that the defendant was negligent in failing to protect him. Judgment for the plaintiff, for \$2000.00 was affirmed.

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations. Actions for personal injury must be brought within two years after the cause of action shall have accrued (60-306). Actions for wrongful death must be commenced within two years—presumably after the occurrence of the injury which caused the death (60-3203).

2. The Kansas legislature is not in session. Hence, no bills are pending.

No official survey has been made in Kansas on the subject of silicosis.

The United States Bureau of Mines has issued a bulletin known as Bulletin No. 545, which deals with silicosis and tuberculosis among miners of the tri-state district of Oklahoma, Kansas, and Missouri.

**AIR HYGIENE FOUNDATION OF
AMERICA, Inc.**

Legal Series, Bulletin No. 1, Part iv



**A Survey of the Statutes and Court Decisions
Respecting Occupational Disease from
Air Pollution**

(For the Confidential Information of members. Not for re-
production, wholly or in part.)

PITTSBURGH, PENNSYLVANIA

JULY 8, 1936

LEGAL SURVY

PART iv

With respect to Occupational Disease Resulting from Air Pollution, Comprising a Study of the Statutes and Court Decisions of all States of the United States.

Prepared for the Legal Committee

of

AIR HYGIENE FOUNDATION OF AMERICA, INC.

by

WILLIAMS, EVERSMAN & MORGAN
ATTORNEYS
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FOREWORD

This part (iv) of Bulletin No. 1, Legal Series, Air Hygiene Foundation of America, contains an analysis of the statutes and court decisions, affecting occupational disease, of ten States.

Part i was a resume of workmen's compensation laws as they affect occupational disease, and common laws and liabilities; part ii included detailed reports on Alabama, Arizona, Arkansas, and California; part iii covered Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa and Kansas.

Section v will be published soon.

H. B. MELLER,
Managing Director

Thackeray Ave. and O'Hara St.,
Pittsburgh, Pa.,
July 8, 1936

CHAPTER XIX KENTUCKY

Workmen's Compensation Act.

Statutes. Carroll's Kentucky Statutes, 1930, Secs. 4880-

Administration. The Act is administered by the Workmen's Compensation Board composed of three members appointed by the Governor for terms of four years each. Communications may be addressed to the Board at Frankfort, Kentucky.

Scope of the Act. Sec. 4880 provides that compensation shall be granted for

" * * * personal injuries sustained by the employee arising out of and in the course of his employment, or for death resulting from such accidental injury; provided, however, that personal injury by accident as herein defined shall not include diseases except where the disease is the natural and direct result of a traumatic injury by accident, nor shall they include the results of a pre-existing disease (but shall include injuries or death due to inhalation in mines of noxious gases or smoke, commonly known as 'bad air', and also shall include the injuries or death due to the inhalation of any kind of gas.) Any employers and employees who are, by provisions of this section, excepted from the provisions of this act, including employers having less than three employees, may subject themselves thereto by joint voluntary application to the board, in writing, for such period as may be stated in the application, which shall be irrevocable during such period and effective thereafter until a written revocation be filed with the board or the employment be terminated. (and any employers and their employees engaged in the operation of glass manufacturing plants, quarries, sand mines or in the manufacture, treating or handling of sand may, with respect to the disease of silicosis caused by the inhalation of silica dust, in like manner voluntarily subject themselves thereto as to such disease.)" (Bold face type and brackets ours.)

The bracketed part of this section dealing with "bad air" and gas was added in 1924; the bracketed part dealing with silicosis was added and became effective June 14, 1934.

In the absence of an election by the employer with respect to silicosis, where a disease results from the inhalation of dust

polluted air in the course of employment and not from inhaling bad air in a mine or any kind of gas, compensation is recoverable only when such disease results naturally and directly from a traumatic injury by accident.

The wilful misconduct of an employee will bar his recovery under the Act. With regard to silicosis, this includes: (1) failure or omission of an employee to observe the rules and regulations adopted by the employer and approved by the Workmen's Compensation Board; (2) failure or omission of an employee truthfully to state, upon the employer's inquiry, to the best of his knowledge, the place, nature, and duration of his previous employment; (3) failure or omission of an employer, upon the employer's inquiry, truthfully to furnish to the best of his knowledge full information about the previous status of his health, habits, and medical attention that he or his blood relatives may have heretofore received; and (4) failure or refusal to submit to medical examination to determine his physical condition with reference to silicosis whenever such examination is ordered by the Board, or to evade or obstruct such examination (Sec. 4882).

Where the employee's injury or death results from the deliberate intent of the employer to produce such injury or death, the compensation may be received in a lump sum to be used, if desired, to bring suit against the employer for any amount that he may desire. Where death results under such circumstances, the dependents may elect to claim under the Act or sue at law (Sec. 4882).

Notice of an accident must be given an employer as soon as practicable after the occurrence, and a claim made within one year after the accident, or, in case of death, within one year after the death. In cases involving silicosis, claims must be filed within one year after the last exposure to silica dust (Sec. 4914). Where silicosis is involved, it is not clear by this section whether, when death occurs, such period is extended to permit a filing of the claim within one year after the death, or whether even then the claim must still be filed within one year after the last exposure.

The notice required will not be invalid because of any inaccuracy unless the employer was misled by such to his injury. A want of notice or a delay in giving the same will not bar a claim if the employer or his representative had knowledge of the injury or if such failure or delay was occasioned by mistake or other reasonable cause (Sec. 4917).

Under the Act the employer, in the case of injury or of death

within two years of the injury, must pay, in addition to any other compensation, a maximum of \$100, or, in the Board's discretion, a maximum of \$200 for medical, surgical, and hospital treatment to cure and relieve the employee from the effects of such injury (Sec. 4883). If these are furnished in such a manner that there is reasonable grounds to believe that the life, health, or recovery of the employee is being endangered thereby, the Board may order a change to be made under reasonable regulations at the expense of the employer (Sec. 4885).

Where death results within two years of the accident, the employer shall pay, in addition to the medical expenses, a sum not to exceed \$75 for burial expenses, plus a death benefit of not more than \$4,000 (Secs. 4893-4896). In cases of total disability, the maximum is fixed at \$6,000; by a schedule certain injuries are deemed total and permanent (Sec. 4897). In cases of partial disability, both temporary and permanent, the maximum amount payable is \$4,000 (Secs. 4898 and 4899).

Where an accident is caused by the employer's intentional failure to comply with any statute or lawful regulation communicated to the employer relative to safety appliances or methods, the compensation will be increased 15%; where such is caused by the employee's intentional failure to use any safety appliance furnished by the employer or to obey any lawful and reasonable rule, order, or regulation of the Board or the employer for the safety of employees or the public, the compensation will be decreased 15% (Sec. 4910).

Where a minor is employed in wilful and known violation of the child labor laws, there is an election to claim compensation or to sue at law for damages. If there is a misrepresentation of age and death occurs, the only right which the representative or parent has is a claim for compensation under the Act (Sec. 4911).

Where a claim for silicosis is made, the Board will, upon application by the employer or employee, appoint one, two, or three disinterested and qualified physicians to examine the employee. Their findings shall be certified to the Board and shall include (1) at what stage, if any, the employee is suffering from silicosis, (2) whether the disability is temporary, partial, or total, and (3) the extent, if any, of the impairment of capacity to work (Sec. 4941).

The filing of a false or fraudulent claim constitutes a misdemeanor punishable by a fine of from \$50 to \$500 or imprisonment from 10 to 90 days (Sec. 4945).

Employers electing to accept the Act are required to insure

their liability for compensation in some authorized corporation, association, or organization or furnish the Board with satisfactory proof of their financial ability to make direct payments, in which case they must also deposit acceptable security, indemnity, or bond to meet the compensation liabilities as they occur. Until such have been complied with, the employer is liable, from the date of the acceptance of the Act, either at law or under the Act (Sec. 4946).

Employers may, subject to defined limitations, form mutual insurance associations (Sec. 4948) and also enter into or continue any agreement with employees to provide a system of insurance (Sec. 4949).

Employers who carry their own risk are assessed against their payroll a maintenance fund tax computed by taking two per cent of the basic premiums chargeable against the same or a similar industry, taken from manual insurance rates for compensation in force in the state (Sec. 4968-8). All insurance carriers insuring employers against liability under the Act are correspondingly taxed (Sec. 4968).

Every employer who comes within the terms of the Act, but who does not elect to operate thereunder, loses the common law defenses of assumed risk, contributory negligence, and negligence of fellow servant in a suit against him by an employee to recover for personal injury or death by accident (Sec. 4960). The defenses are also abrogated when both the employer and the employee fail to come within the Act. If, however, the employee elects not to operate under the Act and the employer does elect, then, in such a suit, the three defenses would be available to the employer (Sec. 4961).

As regards the exclusiveness of the Act, by Sec. 4882 it is provided that where an employer has elected to furnish and accept compensation under the Act, the employer "shall be released" from all other liability whatsoever; * * *. However, in *Jellico Coal Co. v. Adkins*, 197 Ky. 684, 247 S. W. 972 (1923), the Supreme Court decided that this clause does not bar a common law action for disability, caused by negligence of the employer, when the disability is not included within those for which compensation is provided in the Act.

4. Court Construction. As a result of the decisions of the Kentucky courts, where there has been no election by employer and employee in regard to silicosis and where the disability is not caused by inhalation of bad air in a mine or by inhalation of gas, diseases resulting from the breathing of polluted air over a long period of time, in the course of em-

ployment, are not compensable under the Workmen's Compensation Act. This is because they cannot be deemed a "traumatic injury by accident" as is required under the Act.

The first case involving an occupational disease was that of *Jellico Coal Co. v. Adkins*, supra, brought before Sec. 4880 of amended, to recover at law for damages resulting from working in an improperly ventilated mine. On a certain day the plaintiff and a fellow employee had fired certain shots in a room in which they were working and had waited outside for thirty minutes for the smoke to clear before resuming work. In a properly ventilated mine ten minutes is sufficient time, but for several days this room had not cleared in less than half a day. That exposure had caused severe headaches to the plaintiff, but he had not realized there was any danger. Later that day during the process of work he fainted and was taken home. Disablement resulted from a disease known as endocarditis, an inflammation of the lining of the heart.

Since both parties were under the Workmen's Compensation Act, the plaintiff first filed his claim thereunder; but the Board ruled that it was without jurisdiction, since the disability did not result from a traumatic injury by accident. The plaintiff appealed that decision.

Meanwhile this action was filed, and in the appeal of the Board's decision, the action at law was pleaded in bar. The court judged the plea good but further affirmed the action of the Board in finding that it had no jurisdiction in the matter. There was a judgment for the plaintiff in the lower court and that decision was affirmed on appeal. The upper court considered the injury to be an occupational disease not compensable under the Act, because it was not a traumatic injury. The court, in its opinion, said:

"It will be observed that all of these definitions of 'trauma' and 'traumatic' imply the presence of physical force, and this is the generally accepted meaning of the word. Evidently, the act implies that some external force must occur in order to constitute traumatic injury by accident, * * *."

Since the court makes no reference to a definition of "accident", it seems that the court's decision hinges on the single word "traumatic" and that an injury resulting from the breathing of noxious gases would not come within their definition of that word. Subsequent decisions have, however, greatly broadened the meaning of this term. The legislature, in 1924, in the session immediately following this decision, amended Sec. 4880 of the Act and made injuries or death due to inhalation in mines

of noxious gases or smoke, commonly known as "bad air," or injuries or death due to the inhalation of any kind of gas, compensable under the Act. *Crutcher Dental Depot v. Miller*, 66 S. W. (2d) 466 (1933) adds this bit of historic information.

Elkhorn Coal Co. v. Kerr, 203 Ky. 804, 263 S. W. 342 (1924) and *Midland Coal Co. v. Ruckers*, 211 Ky. 582, 277 S. W. 838 (1925), likewise involve actions at law for injuries sustained by breathing impure air and noxious gases in mines. The actions were brought before the 1924 amendment to Sec. 4880 became effective, and the verdicts were for the plaintiffs on the authority of *Jellico Coal Co. v. Adkins*, *supra*.

Although not involving a dust disease, the case of *The Great A. & P. Tea Co. v. Sexton*, 242 Ky. 266, 46 S. W. (2d) 87 (1932), is important because of the court's definitions of the words "accident" and "trauma" as used in the Act. In that case the plaintiff contracted a disease commonly known as rabbit fever while cleaning, for shipment, rabbits which were infected with that disease. The germ entered plaintiff's system through a scratch on his hand. The action was at law, the plaintiff alleging that he did not know that the rabbits were diseased and that the defendant knew or should have known of their diseased condition. The court held that the disease was the result of a traumatic injury by accident and therefore, since both parties had accepted the Workmen's Compensation Act, it was compensable only under the Act. The Court said:

"If an injury is suffered in the course of employment, unexpectedly, and without design, and can be traced to a definite time, place, and cause, it is an accident within the popular sense of that term and as it is used in the compensation law. * * *

"In the definition of 'trauma,' as given by Webster and quoted in the foregoing opinions, we find the following: 'A wound or injury directly produced by causes external to the body.'"

"It will be noted that this does not include within its scope only physical force in the sense of a blow, a current of electricity, or like terms implying power, vigor, violence, or energy in the commonly accepted meaning of its terms, but may be as consistently construed to include any independent influence or cause external to the body coming into direct contact with, and causing injury to, the physical structure thereof."

It will be observed that this definition of "trauma" greatly broadens the meaning of that term as construed by the court in *Jellico v. Adkins*, *supra*.

Following this decision, in *Schable v. Riddell-Robineau Mfg. Co.*, 245 Ky. 409, 53 S. W. (2d) 750 (1932), compensation was granted to dependents where the death of an employee was caused by the inhalation of sawdust in the course of his employment. Here, however, a water pipe burst, and in attempting to make repairs, it was necessary to disconnect certain pipes which blew sawdust into the furnace of a boiler. The inhalation of the sawdust, which extended over a period of less than a day, satisfied the requirements that the injury be traumatic and by accident. It would be difficult to find, in regard to an injury's being traumatic, any distinction between an injury caused by the inhalation of dust polluted air and an injury caused by the inhalation of air polluted with sawdust.

It has also been held that where there is an acceleration of a preexisting latent disease, the resulting disability is compensable under the Act (*Robinson-Pettet Co. v. Workmen's Compensation Board*, 258 S. W. 318 (1924)); that death resulting from a sunstroke is not compensable (*Smith v. Sanitary Mfg. Co.*, 277 S. W. 806 (1925)); and that disability caused by typhoid fever resulting from drinking impure water furnished by the employer is not compensable thereunder (*Mills v. Columbia Gas Constr. Co.*, 55 S. W. (2d) 394 (1932)).

Where there has been no election to come under the Act as to silicosis, and where that part of Sec. 4880 dealing with the inhalation of bad air in a mine or of gas is inapplicable, an injury caused by the inhalation of dust polluted air will be compensable under the Act only where it can be deemed to be a traumatic injury by accident. That such an injury may be considered as resulting from a trauma seems settled by the decision in *Schable v. Riddell-Robineau Mfg. Co.*, *supra*.

II. Other Statutes.

1. State Board of Health.

Sec. 2062f-1. "All persons, firms or corporations operating any factory or workshop where emery wheels or emery belts of any description are used, either solid emery, leather, leather covered, felt, canvas, linen, paper, cotton, or wheels or belts rolled or coated with emery or corundum, or any other abrasive material, or cotton wheels used as buffers, shall for the protection of the health of the employees, provide the same with suction or exhaust systems, or similar apparatus, which shall be placed over, beside or under such wheels or belt in such a manner as to protect the person or persons using the same from the particles of dust produced and caused thereby, and to carry away the dust arising

from or thrown off by such wheels or belts while in operation directly to the outside of the building or to some receptacle placed so as to receive and confine such dust; provided that grinding machines upon which water is used at the point of grinding contact and solid emery wheels that are used occasionally for tool grinding, or emery wheels used only in connection with fitting operations necessitating only momentary contact with wheels, also flexible shaft grinding and swing frame grinding, shall be exempt from the provisions of this act."

Sec. 2062f-2. "It shall be the duty of every person, firm or corporation operating any such factory or workshop to provide or construct such appliances, apparatus, machinery or other things necessary to carry out the purpose of this act, as set forth in the preceding section, as follows: Each and every such wheel shall be fitted with a sheet or cast iron hood or hopper of such form and so applied to such wheel or wheels that the dust or refuse therefrom will fall from such wheels or will be thrown into such hood or hopper by centrifugal force and be carried off by the current of air into a suction pipe attached to said hood or hopper."

Sec. 2062f-3. "Each and every such wheel six inches or less in diameter shall be provided with a three-inch suction pipe; wheels six to twenty-four inches in diameter with four-inch suction pipe; wheels from twenty-four inches to thirty-six inches in diameter with five-inch suction pipe; and all wheels larger in diameter than those stated above shall be provided each with a suction pipe not less than six inches in diameter. The suction pipe from each wheel so specified must be full size to the main trunk suction pipe and the main suction pipe to which smaller pipes are attached shall, in its diameter and capacity, be equal to the combined area of such smaller pipes attached by the same, and the discharge pipe from the exhaust fan, connected with such suction pipe or pipes, shall be as large or larger than the suction pipe."

Sec. 2062f-4. "It shall be the duty of every person, firm or corporation operating any such factory or workshop to provide the necessary fans or blowers to be connected with such pipe or pipes, as above set forth which shall be run at a rate of speed as will produce a velocity of air in such suction or an equivalent suction or pressure of air equal to raising a column of water not less than five inches in a U-shape tube. All branch pipes must enter the main trunk pipe at an angle of forty-five degrees or less; the main suction or trunk pipe shall be either upon the floor or beneath the floor on which the machines are placed to which such wheels are attached. All heads, turns or elbows in such pipes must be made with easy, smooth surfaces, having a

radius in the throat of not less than two diameters of the pipe on which they are connected."

Sec. 2062f-5 places upon the Department of Labor the duty of supervising and enforcing these provisions.

Sec. 2062f-6 provides penalties for a failure to comply with the provisions.

2. Rules and Regulations Adopted by the State Department of Health. Under authority of Sec. 2049 of the Kentucky Statutes, the Board of Health adopted rule 190, which reads:

"Every person, firm or corporation operating a factory, mill, mine, quarry, store, office, workshop or work place of any description, including building and construction work, employing one or more persons to labor shall make the following provisions for the protection of the health of their employees and the community in which the establishment or work is located: * * * 3. The ventilation, heating and lighting of the places of employment shall be adequate and shall be maintained with strict regard for the health, comfort and safety of employees. * * *

The State Board of Health has also made recommendations for compliance with the above rule. After enumerating specific requirements as to the amount of air to be supplied, the recommendation continues:

"Every such factory, mill, store, office, workshop or workplace should be kept free from gas or effluvia arising from sewer, drain, privy or other nuisance on the premises. All poisonous or noxious fumes or gases arising from any process, and all dust of a character injurious to health of the persons employed, which is created in the course of a manufacturing process, within such factory, mill or workshop, should be removed, as far as practicable, by either ventilating or exhaust systems.

"All decomposed matter and all refuse of any workplace which may become a nuisance or menace to health should be removed and disposed of in such a manner as not to cause a nuisance; and all cleaning shall be done, as far as possible outside of working hours; but if done during working hours, should be done in such a manner as to avoid the unnecessary raising of dust or noxious odors."

These rules are contained in a pamphlet entitled "Kentucky Labor Laws," distributed by the Department of Labor of Kentucky.

3. Mines and Mining (Coal)

Sec. 2739-19 treats at length the method of ventilation, the action to be taken where the ventilation is interrupted, maps and plans to be submitted for approval before any additional openings are made, the amount of air to be supplied, the number of men permitted on each air current or split, and other matters pertaining to ventilation. The section in its entirety should be carefully scrutinized by mine owners.

Sec. 2739-20 "In all mines accumulations of fine dry coal dust shall, as far as practicable, be removed from the mine and all dry and dusty operating sections kept thoroughly watered or rock dusted or dust allayed by such other methods as may be approved by the Chief of the Department of Mines and Minerals."

4. Children.

Sec. 331a-1 prohibits the employment of children under fourteen years of age in any factory, mill, workshop, mercantile establishment, etc.

Sec. 331a-2 prohibits the employment of children between fourteen and sixteen years of age in any factory, mill, workshop, mercantile establishment, etc., unless the employer procures an employment certificate.

Sec. 331a-9 prohibits children under sixteen years of age from operating or assisting in operating certain machines among which are saws, wood shapers, planers, sandpaper or wood polishing machines, emery or polishing wheels, leather burnishing machines, rolling mill machinery, etc.; from working in any processes in which dangerous or poisonous acids are used; from working in the manufacture or packing of paints, colors, or white or red lead; from working in occupations causing dust in injurious quantities; from working in the manufacture of dangerous or poisonous dyes; and numerous other occupations dangerous to the life or limb or injurious to the health or morals of such children.

Sec. 331a-13. "The walls and ceiling of each room in every manufacturing establishment where minors are employed, shall be lime washed or painted when, in the opinion of the labor inspector, it shall be conducive to the health or cleanliness of the persons working therein."

Sec. 331a-16 enumerates the penalties for permitting children to work in violation of the Act.

5. Sanitation of Food Establishments.

2060b-1 provides that every establishment used for the preparation, manufacture, packing, storage, sale or distribution of any food intended for sale must be properly and adequately lighted, drained, plumbed and ventilated, and conducted with strict regard to the health of the employees and to the purity and wholesomeness of the food.

2060b-13 enumerates the penalty for a violation of the sections dealing with the sanitation of food establishments.

III Common Law Liability.

As previously observed in discussing the scope of the Workmen's Compensation Act, the case of *Jellco Coal Co., v. Adkins*, supra, definitely decided that the Workmen's Compensation Act was exclusive only as to such injuries as were compensable under the Act; whereas, other injuries not covered by the Act, for which there was a recovery at common law, are unaffected by the Act.

In that case, a verdict for the plaintiff was affirmed where the injury for which damages were sought was the liability resulting from a disease known as endocarditis, an inflammation of the heart, caused by the breathing of foul air in a mine during the course of employment.

The negligence upon which plaintiff's action was predicated was the breach of a statute which provided that no working place should be driven more than sixty feet beyond a breakdown except with the consent of an inspector. There was no claim that such consent had been given.

The court affirmed the verdict of the jury in plaintiff's favor, holding that since the defendant had failed to conform to a statutory duty, it could not rely on the defense of assumed risk; and, furthermore, the plaintiff was not guilty of contributory negligence as a matter of law in continuing to work after discovering the danger of which he complained.

Royal Collieries Co. v. Wells, 244 Ky. 303, 50 S. W. (2d) 948 (1932), also involves an action at law for injuries alleged to have resulted from inhaling bad air in defendant's mine. The cause of action also arose before the 1924 amendment to Sec. 4880 of the Workmen's Compensation Act, making injuries so sustained compensable thereunder. In affirming a judgment for the plaintiff, the court made an interesting statement regarding contributory negligence:

"* * * A servant may know a thing is defective, and yet by reason of his inexperience be incapable of comprehending the danger from it. By continuing at work the servant cannot be said to be negligent

unless he not only knows the defects but knows the danger, or by the exercise of ordinary care in the exercise of his employment should know it (citing cases). There is a peculiar reason for applying this rule in the case of a subtle poison pervading the air, whose effect is only known to the medical profession, or those who have studied the subject. Kitchen may have been willing to undergo the discomforts of a headache or the temporary sickness that resulted from the mine, but it may be that he would not have been willing to take the risk of the noxious gases if he had known their effect on the constitution, and the danger of destroying his entire vitality if he continued to work in the mine. The rule to be applied to an ignorant servant should be more liberal in the case of a subtle agency like had air than in the case of those physical things like the want of props or the cracking of a roof which he could plainly see and any man of prudence would understand the danger."

A recent case directly in point is *Christopher's Admr. v. Blanton Stone Co.*, 258 Ky. 587, 80 S. W. (2d) 590 (1935). The action was at law for the death of an employee caused by the inhalation of dust and small particles of limestone rock while employed for approximately a year in defendant's rock quarry. The petition alleged that the plaintiff did not know of the danger and that the defendant knew or should have known of such danger. The court held for the defendant on the ground that the petition was insufficient because the plaintiff had alleged a failure to provide a mask, whereas, there was no statute imposing such a duty upon an employer and the petition did not allege negligence of the employee. The court also declared that the fact that the work was hazardous did not make the employer liable for all injuries to his employees but only for such injuries as were caused by his negligence in breaching some duty owed the employees.

Under these decisions, it is apparent that, except as modified by the Workmen's Compensation Act, there is a common law action for disability resulting from an occupational disease caused by the inhalation of dust in the course of employment if based upon the negligence of the employer.

"Personal injury by accident" specifically includes injuries or death due to inhalation in mines of noxious gases or smoke, commonly known as "had air," and also injuries or death due to the inhalation of any kind of gas (Sec. 4880); therefore, it seems clear that under Sec. 4960 an employee is denied the common law defenses in an action brought for such disability if the employer has not elected to operate under the Act.

The effect upon the employer's right to the common law defenses, when sued on account of silicosis, in case of his failure to elect to operate under the Act as to silicosis, is not so clear. Sec. 4880 does not define silicosis as a "personal injury by accident"; Sec. 4960 denies the common law defenses to the employer, in case of failure to elect to operate under the Act, "in any suit at law * * * to recover damages for personal injury or death by accident." It therefore appears to be an open question whether the employer, not operating under the Act, would be barred the use of the common law defenses if sued on account of silicosis.

IV. Miscellaneous Matters of Interest.

1. **Statute of Limitations.** By Sec. 2516 of the Kentucky statutes, an action for personal injuries or death must be commenced within one year after the cause of action has accrued.

2. **Pending Legislation.** There are at present no bills pending in the legislature relating to precautionary measures to be taken with respect to dust diseases, nor has any official survey of dust hazards or dust diseases been made.

CHAPTER XX LOUISIANA

Workmen's Compensation Act.

1. Statutes. Louisiana General Statutes 1932, Secs. 4390 to 4432 inclusive.

2. Administration. There is no provision for the creation of a commission or board to administer the Workmen's Compensation Act.

Secs. 4406 and 4407 (Act—Secs. 17 and 18) provide for settling all matters of compensation between the employer and employee by agreement reduced to writing which shall be substantially in accord with the various provisions of the Act, and which shall be approved by the court (presumably the District Court). Settlement so approved is entered as a judgment of the court. In the event of failure to agree, either party may present a verified complaint to the judge of the District Court; an answer is filed; and, upon the issues so made, the judge hears evidence and decides the merits of the controversy. Right of appeal from the judge's decision to the appellate courts is provided.

Information concerning the Act and its administration may be procured by writing to the Secretary of State of Louisiana at Baton Rouge.

3. Scope of the Act. Sec. 4390 (Act—Sec. 1) enumerates the persons and occupations to which the Act applies.

Paragraph 1 of this section makes the Act applicable to most public employments.

Paragraph 2 provides:

"Every person performing services arising out of and incidental to his employment in the course of his employer's trade, business or occupation in the following hazardous trades, businesses and occupations:" (are covered by the Act).

(Here follows an enumeration of almost all known occupations, including specifically mills, foundries and factories of various kinds, mines, quarries, etc.)

Paragraph 3 then provides that any other trade, business or occupation may be determined to be hazardous and therefore covered by the Act, either by agreement of the parties or by order of the judge of the court after submission of that question to the court.

period of time is in every case an occupational disease, for which there is no compensation under the Act. The court found that the condition

"* * * was caused by trauma and friction of a continuous and progressive nature over a long period of time, caused by plaintiff's daily use of spurs in climbing poles. After the horny growth began, each time he jabbed his spur into a pole he was accelerating his then diseased condition and, * * * each time this was done it was a new trauma."

II. Other Statutes.

1. Health and Public Safety.

Sec. 3405 of the General Statutes authorizes the Board of Health to enact

"* * * all needful rules and regulations for the better protection of the health of operatives and employees, working in manufactories, workshops, laboratories and other places in which substances, materials, or compounds, poisonous in their nature, or otherwise injurious to the health of said operatives or employees are used, manufactured, compounded, prepared or handled."

Sec. 3406 provides that the rules and regulations so adopted shall be observed and complied with by the owners, proprietors, and all persons in charge of the establishments covered by the above section, within twenty days after being served by the Board of Health with a copy of such rules and regulations, and a notice to comply therewith.

The Department of Health has informed us that no rules or regulations have been adopted under the authority of the above sections dealing with dust hazards in the establishments therein covered. It is apparent, however, that, by virtue of the phrase "or otherwise injurious to the health * * *," the power does exist in the Board, if and when it sees fit, to adopt rules and regulations to be complied with by those establishments wherein there prevail dust conditions endangering the health of employees and operatives.

2. Labor and Industry—Employment of Women and Children.

Sec. 4337:

"In all establishments in this state wherein children, young persons or women are employed where any process is carried on by which dust, or smoke

or lint is generated the inspector shall have the power and authority to order that a fan, or fans, or some other dust, or smoke or lint removing or consuming contrivance or contrivances be so placed as to prevent the inhalation of such dust or smoke or lint by the employees; provided, that two mechanical engineers, one chosen by the inspector and the other by owner or owners of the establishment, shall agree as to the necessity of such fan or fans or other dust or smoke or lint removing or consuming contrivance or contrivances. Upon the failure of said two mechanical engineers to agree, a third mechanical engineer shall be chosen to arbitrate." (Bold face type ours.)

A failure to comply with this section is punishable by fine or imprisonment.

In the absence of an order by the engineers or arbitrator, this section provides no mandatory duty upon an employer whose establishment comes within its terms to provide fans to carry off dust, lint or smoke present in his establishment; and the section could not be made the basis of a claim of negligence on the part of the employer unless there was a failure to comply with an order properly made.

3. Labor Health Laws.

Sec. 4345:

"Hereafter all newspaper and printing concerns operating in the State of Louisiana, using three or more linotype or other type casting machines, shall be required to install in the room or rooms in which said machines are operated, an exhaust fan or other device of sufficient capacity to keep pure air circulating in said room, and to expel the poisonous metal fumes arising from said linotype machines."

Sec. 4346:

"All newspapers and printing concerns operating in the State of Louisiana, using three or more linotype or other type machines shall be required to install vent pipes on each machine running from the metal pot to a flue or other aperture leading to the outside of a building."

Sec. 4347 provides that a violation of the provisions of the Act is punishable by fine or imprisonment.

4. Minerals, Oils and Gas—Department of Mines and Minerals.

Sec. 4718:

"It shall be the duty of the Deputy Supervisor of Minerals to inspect all mining operations carried on in the State, and he shall have power to prohibit any such operations as he may deem unsafe or dangerous to life or property or wasteful of natural resources; reserving a right of appeal by the operator, or operators, or owners, to the Conservation Commission for ten days if notified by such operator or operators, or owner, to the Supervisor at the time they shall receive notice to cease operation."

Any person guilty of carrying on prohibited operations shall be guilty of a misdemeanor, punishable by fine or imprisonment. A refusal to permit an inspection is punishable by a fine.

III. Common Law Liability.

Art. 2315 of the Civil Code of Louisiana provides:

"Every act whatever of man that causes damages to another, obliges him by whose fault it happened to repair it. * * *

This section codifies the general view that the common law affords a remedy for any injury which results from the negligence of another.

It is reasonable to assume that an employee could recover in Louisiana under the common law for disability from disease caused by the inhalation of dusts, gases, or fumes in the course of employment and over a long period of time, where the negligence of the employer could be proven.

Such assumption finds support in *Faulkner v. Milner-Fuller, Inc.*, 154 So. 507 (Court of Appeals, 1934). The plaintiff therein brought suit under the Workmen's Compensation Act, and alternatively for damages at common law, for lead poisoning which resulted from the inhalation of fumes from lacquers and paints during the process of painting used automobiles. The defendant attacked the petition on the ground that the plaintiff had not set forth a cause of action, either under the Workmen's Compensation Act or at common law.

The court, construing the pleadings in favor of the plaintiff, held first that a cause of action had been sufficiently set forth under the Workmen's Compensation Act. It pointed out that the plaintiff's injury could very properly be found to be an accidental injury within the meaning of the Act, since the injury was not one that was usual or might be expected to befall a

person engaged in painting automobiles. Moreover, it was not a positive conclusion that such liquids regularly and constantly gave off fumes which could and would be expected to produce the injury complained of. Such might also be traceable to an improper compounding of chemicals so that, without the user's knowledge, unusually strong fumes might be given off, causing an unexpected or unanticipated injury, and that improper ventilating facilities might bring on injury so suddenly and unexpectedly as to make it accidental.

The court also found that the plaintiff had alleged a good cause of action at common law. The petition stated that the plaintiff knew or should have known that the fumes given off were dangerous and would cause injury or death to employees inhaling the same; that it was not only customary for employers under such circumstances to furnish gas masks, but it was their duty to do so; that no mask or other protection was furnished plaintiff; and that he was ignorant, until too late, of the danger involved. It was held that a good cause of action was set forth "under the well established rule that the master is bound to furnish his servant with a safe place to work and provide him with safe and adequate implements and appliances with which to do his work."

Sec. 4423 (Act—Sec. 34) does not preclude the right to bring a common law action for an occupational disease caused by the negligence of the employer and resulting from the inhalation of dusts, gases and fumes, although both employee and employer have, prior to the injury, elected to accept the Workmen's Compensation Act, for a reasonable construction of this section would be that the Act is exclusive only as to injuries which are compensable under its terms. In *Faulkner v. Milner-Fuller, Inc.*, supra, the court, without objection, permitted the plaintiff to state a cause of action under the Act, and in the alternative to set up a cause of action at common law. This necessarily implies that the plaintiff had the right to prosecute his common law right of action if it was held that his disability was not covered by the Act, and hence that the Act is exclusive only as to those injuries for which compensation is provided.

IV. Miscellaneous Matters of Interest.

I. Statute of Limitations.

By Art. 3536 of the Civil Code, all tort actions, which would include actions for personal injuries based upon negligence of the defendant, are subject to a one year limitation. By Art. 2315 of the Civil Code, where death intervenes, an action may be brought within one year from the date of the death.

CHAPTER XXI

MAINE

Workmen's Compensation Act.

Statutes. Revised Statutes of Maine 1930, ch. 55, Secs. 1-47.

Administration. The Act is administered by the Industrial Accident Commission, consisting of five persons, three of whom must be attorneys at law. They are appointed by the Governor. Communications may be addressed to the Commission at Augusta, Maine.

3. Scope of the Act. The Act is elective as to private employments. The procedure to be followed by the employer in making such election is stipulated in detail (Sec. 6). The common law defenses are denied an employer of more than five persons, who has failed to elect to come under the Act, in any action " * * * to recover damages for personal injuries sustained by an employee by accident arising out of and in the course of his employment, or for death resulting from such injuries. * * * " (Secs. 3, 4, and 5). An employee of an employer who has assented to become subject to the Act, "shall be held to have waived his right of action at common law to recover damages for the injuries," if he shall not have given his employer, at the time of his contract of hiring, notice in writing that he claimed such right (Sec. 7).

Sec. 8 then provides:

"If an employee who has not given notice of his claim of common law or statutory rights of action, or who has given such notice and has waived the same, as provided in the preceding section, receives a personal injury by accident arising out of and in the course of his employment, he shall be paid compensation and furnished medical and other services, as hereinafter provided, by the employer who shall have assented to become subject to the provisions of this act." (Bold face type ours.)

There is no mention in the Act of disease or occupational disease.

4. Court Construction.

A. Injury by Accident.

Cases involving occupational diseases arising from the breath-

ing of dusts, gases and fumes in the course of employment, are infrequent in Maine. *Dillingham's Case*, 127 Me. 547, 142 A. 865 (1928), *infra*, is the only one directly in point; but other decisions have also been discussed to show what the courts have held to be included within "injuries by accident" as used in the Act. In *Larabee's Case*, 120 Me. 242, 113 A. 268 (1921), an employee while removing ashes from under the boilers of a mill, breathed gas fumes from the ashes. Pneumonia developed and death resulted. Compensation was awarded the claimant.

In *Ballou's Case*, 121 Me. 282, 116 A. 591 (1922), a workman while escaping from a burning mill, inhaled flames, smoke and gas. There resulted an inflamed condition of the lungs which developed into pneumonia, from which he died. Compensation was granted.

In *Ferris v. City of Eastport*, 123 Me. 193, 122 A. 410 (1923), the plaintiff, a volunteer fireman, became drenched by snow falling off a roof while extinguishing a fire. As a result, he developed pneumonia which disabled him for some time. Compensation was refused on the ground that it was not a personal injury by accident since it was not unusual, untoward, or unforeseen for a fireman, in the course of extinguishing a fire, to get wet in winter as well as in summer.

It would seem, by analogy, that compensation would be denied for disability caused by inhalation of dusts, gases or fumes, if such happening were not "unusual, untoward or unforeseen" in the course of the employee's work, even though such disability might be compensable if acquired in the same manner in another type of employment.

In *Brodin's Case*, 124 Me. 162, 126 A. 829 (1924), the claimant contracted typhoid fever from drinking the water furnished him by defendant employer. In granting compensation, the Court defined an accident as "an event that takes place without one's forethought or expectation; an undesigned, sudden and unexpected event. Its synonyms include mishap, mischance, misfortune, disaster, calamity, catastrophe."

The leading case in Maine dealing with occupational disease is *Dillingham's Case*, 127 Me. 547, 142 A. 865 (1928). There the claimant began work for the defendant on September 13, 1927, pulling from the soles of shoes the tacks that held the soles on lasts. It was necessary to wet the soles to soften the leather, and in the process his hands were frequently immersed in the water. After working for one week, he quit to have medical care for his hands, which had broken out in blotches and were sore. The ailment was diagnosed as eczema, or leather poisoning cumulative and referable to his work, contractable with less

exposure on the part of some persons than others depending on the susceptibility of the individual. The Court refused compensation on the ground that the claimant was suffering from an occupational disease, i. e. "one normally peculiar to and gradually caused by the occupation in which the afflicted employee is or was regularly engaged, and to which everyone similarly working in the same industry is alike constantly exposed," which is not an injury by accident within the meaning of the Act. An accident was defined by the Court as being "an unusual, undesigned, unexpected, and sudden event."

Although the period of exposure to the conditions causing the disease was only one week's time and therefore such as might have been deemed acute poisoning, nevertheless the Court found such to be gradually caused. Since no later Maine decision treating occupational disease can be found, it is our opinion that, in general, disability resulting from breathing dusts, gases, and fumes in the course of employment would not be compensable.

II. Exclusiveness of the Act.

By Sec. 7 of the Workmen's Compensation Act, it is provided that "An employee of an employer who shall have assented to become subject to the provisions of this Act * * shall be held to have waived his right of action at common law to recover damages for the injuries aforesaid sustained by him * *." The "injuries aforesaid" refer to "injuries by accident" and the conclusion must be that injuries formerly the basis of recovery at common law, other than "injuries by accident," are unaffected by the Workmen's Compensation Act and may still be the basis of a suit at common law.

III. Other Statutes.

1. Employers' Liability Act.

What is known as the Employers' Liability Act is included as Sections 48-56 of Chapter 55 of the Maine Statutes. That Act was passed in 1909 some six years prior to the enactment of the Workmen's Compensation Act and has no particular significance for the purposes of this survey.

2. Labor—Chapter 54.

Section 10 provides that the Department of Labor and Industry is empowered to enforce "all laws established for the protection of health, lives, and limbs of operators in workshops and factories, on railroads, and in other places."

Section 13 provides that, where the Commissioner, as state factory inspector, finds upon inspection that the ventilation of

2. There are at present no bills pending relative to dust hazards in Maine, and no official surveys have been made.

any workshop or factory is such as to be injurious to the health of employees, he shall notify the employer to make, within thirty days, the alterations or additions which he deems necessary for the safety and protection of the employees.

3. Health—Chapter 22.

"Sec. 26. Every physician attending upon or called to visit a person whom he believes to be suffering from poisoning from lead, phosphorus, arsenic, or mercury, or their compounds, or from anthrax, or from compressed air illness, or any other ailment or disease contracted as a result of such person's occupation or employment, shall, within 10 days after his first attendance upon such person, send to the department a written notice, stating the name, post-office address and place of employment of such person, the nature of the occupation and the disease or ailment from which, in the opinion of the physician, the person is suffering, with such other specific information as may be required by the department."

"Sec. 27. In like manner, as is provided in the preceding section, every case of lead poisoning and of suspected lead poisoning, which has resulted from the use of water which contains lead or is suspected of containing lead, shall be reported to the department; and when such reports are received, the said department shall assist, by laboratory work and otherwise, the attending physician to determine whether the case is one of lead poisoning, and if so, the course of the poison."

Sec. 28 provides that the failure of a physician to perform the duties imposed by these sections constitutes a misdemeanor punishable by fine.

III. Common Law Liability.

No cases have been found wherein recovery has been sought at common law in Maine for disability from disease caused by the inhalation of noxious dusts, gases or fumes. It is assumed that the general rule would prevail and recovery would be possible if negligence of the employer could be shown.

IV. Miscellaneous Matters of Interest.

1. Limitations of Action—Chapter 95.

An action for personal injuries seems to come within that part of Sec. 90 which provides that actions on the case, except libel and slander, must be brought within six years after the cause of action accrues. Where death occurs, the action must be brought within two years after the death and the recovery is limited to \$10,000 (Sec. 99).

CHAPTER XXII

MARYLAND

1. Workmen's Compensation Act.

1. Statutes. Bagby, Annotated Code of Maryland, 1924, Article 101, Sec. 1 through Sec. 65.

2. Administration. The Act is administered by the State Industrial Accident Commission, composed of five members appointed by the Governor for terms of five years each. Communications may be addressed to the Commission at Baltimore, Maryland.

3. Scope of the Act.

A. Definitions.

Sec. 65 (6) provides:

"'Injury' and 'personal injury,' as used in the Act, mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom."

Attention is called to the phrasing "accidental injuries," as contradistinguished from "injuries by accident", which occurs in numerous Workmen's Compensation Acts. The case of *Victory Sparkler & Specialty Co. v. Francks*, infra, stresses the importance of this difference in phrasing.

The wording of this definition would indicate that there can be no recovery by an employee under the Act for a disability due to an occupational disease arising out of and in the course of his employment. The courts have, however, so construed "accidental injuries" as to include disease resulting from a condition negligently allowed to exist; hence, disease caused by negligence seems to be compensable.

This construction was first announced in 1925 in the case of *Victory Sparkler & Specialty Co. v. Francks*, infra. A careful examination of that and subsequent decisions is necessary for an understanding of the Maryland law.

B. Compulsory Character and Exclusiveness of Liability.

As a means of specifying the occupations and employments covered by this Act, it designates, in paragraph 32, certain employments as being extra hazardous. There are forty-six subparagraphs, and they enumerate practically every trade, business, or occupation carried on by private employers, and they include specifically practically all industries where dust or other forms of air pollution are to be encountered. Certain

employments are excepted, but the exceptions may be considered immaterial for the purposes of this survey.

As to the occupations and employments enumerated in paragraph 32, the Act is compulsory (paragraph 14) and, by joint election of employer and employee, those not coming within the occupations enumerated in paragraph 32 may become subject to the Act. The compulsory character of the Act consists in the requirement that every employer subject to it shall pay or provide compensation according to the schedules of the Act for disability or death of the employee resulting from accidental personal injury.

The liability of the employer so prescribed is exclusive (paragraph 14). In other words, the employee has no rights against an employer, subject to the Act, except such rights to compensation as are prescribed in the Act. But this rule does not hold if the employer fails to secure the payment of compensation as required by the Act. If he does so fail to secure the payment of compensation, the injured employee, or, in case of death, his legal representative, may, at his option, elect to claim compensation or to maintain an action in court for damages. If, under these circumstances, the employee resorts to the court in an action for damages, the employer is denied the common law defenses of fellow servant, assumed risk, and contributory negligence.

In so far as occupational disease is concerned therefore, the employee can recover only the compensation specified in the Act (when the occupational disease is compensable at all), but, if the employer fails to secure the payment of the compensation, the employee may then pursue any common law remedy which he otherwise would have had.

4. Court Construction.

In *Victory Sparkler & Specialty Co. v. Francks*, 147 Md. 368, 128 A. 635, 44 A.L.R. 363 (1925), the plaintiff, a young girl, brought an action at law for injuries sustained by the gradual contraction of phosphorus poisoning resulting from the inhalation of fumes and gases wrongfully and negligently permitted to be collected where she was employed by the defendant in making fireworks. She was exposed to such fumes and gases during the years 1921, 1922, and 1923. The employer's defense was that her disability was an injury, within the terms of the Workmen's Compensation Act, that her sole right of recovery was the right of compensation, and that she could not maintain this action for damages. The plaintiff was given judgment, in the trial court, for \$22,500.

On appeal from that judgment, two issues were considered by the reviewing court: (1) Was the employer liable at common law to the servant if her injury was not compensable under the terms of the Workmen's Compensation Act, and (2) was not the disease of phosphorus poisoning an injury outside the purview of the Act?

In answering the first question, the court discussed, at length, the recitals in the preamble to the Workmen's Compensation Act and the peculiar wording of several sections, and concluded that all rights of employees to recover against the employers were merged in the Workmen's Compensation Act; that it provides the exclusive remedy; and that no right of common law recovery longer exists for any purpose against an employer, in Maryland, who complies with the Act.

By inference, at least, the decision recognizes that a common law right of the employee to recover for a diseased condition which was due to the negligence of the employer did exist prior to the passage of the Workmen's Compensation Act. It may, therefore, be assumed that the employee still has such right of action for common law damages, under Section 14 of the Act, if the employer fails to secure the payment of compensation.

In answering the second question as to whether or not the disease of phosphorus poisoning was compensable under the Act, the court so defines occupational disease as to limit it to disease which arises from causes incident to the occupation or calling which has its origin in the inherent nature or mode of work, and which is the usual result or concomitant.

If the disease is not the customary or natural result of the profession or industry, per se, but is the consequence of some extrinsic condition or independent agency (in this case, the employer's negligence), it is not, the court said, an occupational disease at all in an accurate sense; it is then an "accidental injury," i. e., an injury occurring through the "accident" or "chance" of the employer's negligence.

This reasoning brought the disability complained of within the Workmen's Compensation Act and limited the claimant to the compensation provided in the Act. The judgment was therefore reversed, and she was denied any recovery, except compensation.

NOTE:

It will be observed that the definition of "occupational disease" adopted in the above case is the one identified as "Definition No. 1" in Chapter 3 of this survey. For occupational disease so construed, the employee has never had a right of action at com-

mon law, for it is not caused by the employer's negligence. This decision, while denying the employee an action at common law for damages, still preserves a right of recovery, where the employer's negligence is the cause, by giving the employee the benefit of compensation under the Act.

Disposition of the court to expand the Workmen's Compensation Act, by construction, so as to cover all possible situations, is not in evidence in *Atlantic Coast Shipping Co., et al., v. Siaslak*, 158 Md. 349, 148 A. 452 (1930), where compensation was denied the claimant who developed a hernia as a result of lifting tin plates onto trucks. The court concluded that he did not suffer accidental injury, for

"* * * there was no evidence that the injury was caused by any unusual strain or by any condition not incident to claimant's employment."

In *Gunter v. Sharp & Dohme, et al.*, 159 Md. 438, 151 A. 134 (1930), compensation was denied the plaintiff who was employed by the defendant to mix bichloride and cyanide powders, having been so engaged for three years preceding the disability, and for three years before that in making other kinds of powders.

Compensation was denied on the ground that claimant had not received an accidental injury within the Act.

In *Cambridge Mfg. Co. v. Johnson*, 160 Md. 248, 153 A. 283 (1931), the claimant was employed as the foreman of the defendant in mixing poultry and dairy feed from September, 1921, to October, 1928. The operation of mixing the feed caused the air to be impregnated with dust, at times quite thickly. The claimant developed pulmonary tuberculosis, which the medical testimony showed was exaggerated by the inhalation of dust during his employment. The court refused compensation on the ground that this was not an accidental injury within the meaning of the Act.

In *Sinako v. A. Weiskettel & Sons Co.*, 163 A. 851 (Court of Appeals, 1933), the claimant sought to recover compensation for the death of her husband, who had been employed as a sand blaster by the defendant. The deceased used a pressure gun in a small room to clean rusty tubs with the sand. There was only one fan on the side, and anyone working there always inhaled a great deal of dust. One doctor for the claimant testified that the decedent died from "pneumoconiosis or occupational disease."

The court denied compensation under the Act, saying:

"* * * all the evidence shows it was an occupational disease, and there is no evidence of negligence on the part of the appellees." (Bold face type not in text.)

In *Schemmel v. T. B. Gatch & Sons Co.*, 164 Md. 671, 166 A. 39 (1933), which involved the right of an employee to compensation, under the Workmen's Compensation Act, for a cerebral hemorrhage resulting in a disability, the court, in holding for the claimant, reviewed and reaffirmed its definitions of "occupational disease" and "injury" as follows:

"An injury may be said to arise out of the employment when it results from risks or perils peculiar to and inherent in the nature and scope of the work and its obligations. *Schneider Workmen's Compensation*, Sec. 262, but it is only compensable under the act where it is accidental in character. So an occupational or industrial disease resulting from conditions necessarily incident to the occupation, while it may be said to arise out of the employment, is not compensable, because it is not accidental. *Gunter v. Sharp & Dohme*, 159 Md. 444, 151 A. 134, while a disease, even though gradual and insidious in its approach, which is caused by casual unexpected conditions in the employment which increase its hazards, but which the employee is not bound to anticipate not only arises out of the employment, but is compensable, because it is accidental * * * (citing cases)." (Bold face type not in text.)

Hence it appears that the Maryland court adheres to its unique construction and holds that disease caused by negligence is "accidental injury" and therefore compensable under the Workmen's Compensation Act. As previously stated, such right under the Act bars a common law action, if the employer complies with the Act.

II. Other Statutes.

1. Mines—Article 89.

Sec. 99—This section is quite long and should be consulted with respect to the character of ventilation required to carry off gases and provide adequate fresh air. This section provides certain minimums and also requires compliance with any order of the District Mine Inspector as to the furnishing of fresh air in excess of the statutory minimums.

Sec. 17—This section defines "gas" as used in the mining statutes.

The foregoing sections do not place any statutory obligation

upon the mine operators with respect to dust hazards.

2. Minors—Article 100.

Sec. 8—This prohibits the employment of any child under 16 years of age in a long list of enumerated industries, including particularly those where dangerous and poisonous acids are used and occupations causing dust in injurious quantities.

Sec. 22—This section prohibits the employment of any child under 18 years of age in certain classes of employment, including particularly the operation of emery wheels or in operations where any abrasive polishing or buffing wheel articles of the baser metals or iridium are manufactured.

3. Dust Statutes—

There are no other statutory provisions with respect to workshops and factories creating any specific duty on the part of employers in regard to dust elimination.

III. Common Law Liability.

The right of the employee to recover damages for a diseased condition caused by the negligent acts of the employer is discussed at some length in a preceding section of this chapter dealing with construction of Workmen's Compensation Acts. The conclusion is there expressed that the common law right of recovery for disease due to the negligence of the employer existed in Maryland prior to the enactment of the Workmen's Compensation Act, and that it still exists where the employer fails to provide compensation as required by that Act. There is further indication that the Maryland courts recognize the duty of the employer to furnish a reasonably safe place to work and that air pollution, from dust, gases or otherwise, is a factor which the employer must take into consideration. This is indicated by several decisions, a few of which we will cite as illustrative:

State v. Flannegan, 11 Md. 481, 74 A. 818 (1909). In this case, damages were sought by an employee who was overcome by poisonous gas while excavating a trench for a sewer. Although the plaintiff did not recover damages, the court recognizes the usual common law principles of liability in this decision.

The case of *Victory Sparkler & Specialty Co. v. Francks*, 128 A. 635, is discussed at length in a preceding section of this chapter.

IV. Miscellaneous Matters of Interest.

I. Statute of Limitations.

Maryland Code, Article 57, Sec. 1., provides that actions for

personal injury from negligence must be brought within three years from the time the cause of action accrued.

Article 67, Sec. 2, requires that actions for negligence causing death must be commenced within twelve calendar months after the death occurs.

2. Rules.

Under the Workmen's Compensation Act, the Commission is authorized and directed to formulate rules and regulations for the safety of employees and the prevention of accidents in occupations covered by the Act. Copies of such rules, if and when adopted, may be procured by communication with the State Industrial Accident Commission.

CHAPTER XXIII MASSACHUSETTS

Workmen's Compensation Act.

Statutes. Mitchie's Annotated Laws of Massachusetts
1933. Chapt. 152, Secs. 1-75.

1. Administration. The act is administered by the Department of Industrial Accidents. By Section 1 of Chapter 24, it is provided:

"There shall be a department to be known as the department of industrial accidents, consisting of the industrial accident board hereinafter provided for."

The Department of Industrial Accidents and the Industrial Accident Board are therefore identical. There are seven members on the Board, one of whom is a woman, and each of whom is appointed for a term of five years by the Governor. Communications may be addressed to the Board at Boston, Massachusetts.

2. Scope of the Act. Under the Massachusetts Workmen's Compensation Act disability resulting from an occupational disease is compensable. Section 9B of the Act, effective October 14, 1935, provides that, where a claim for compensation is made alleging an injury due to an industrial disease, the industrial accident board shall submit the claim to three physicians selected by it. Even before such section became effective, compensation was granted because of Section 26 which provides that a "personal injury arising out of and in the course of employment" is compensable, thereby eliminating the necessity of an injury being "by accident" as is the case in many jurisdictions where compensation for disability resulting from an occupational disease is denied. This is further discussed in the section treating court construction.

Election by an employer, to operate under the Act, is made by procuring insurance as required by the Act and by giving notice of such election to the employees (Sec. 21, 24, 26), but such election can subsequently be withdrawn by failing to re-insure (Sec. 22). The employer must also give notice of his election to each new employee (Sec. 22).

Each employee is automatically subject to the Act unless he gives notice, as prescribed in Section 24, that he claims his common law right of action instead of his right to compensation.

Where an employer does not elect to come under the act, the defenses of assumed risk, contributory negligence, and negligence of fellow servant are denied him (Sec. 66). Where an action at law is brought by employees of an insured person, the defenses are not taken away (Sec. 67).

The act requires that notice must be given as soon as practical after the happening of the injury and that claim made within six months after such occurrence, or, in case of death or incapacity, within six months after the death or the removal of the incapacity (Sec. 41).

Where an employee is injured by his own serious and willful misconduct, compensation will be denied him: in the event of death, however, compensation to his dependents will not be barred (Sec. 27).

The maximum compensation in the event of death is \$6400 (Sec. 31), for temporary total disability \$4500 (Sec. 34), for permanent total disability \$4500 plus a weekly compensation of from \$9 to \$18 during the continuance of disability (Sec. 34a), and for partial disability \$4500 (Sec. 35).

Where the employer's serious and willful misconduct causes the injury, the amount of compensation is doubled. The employer must, in such cases, repay the extra compensation to the insurer and must also appear and defend against such case. The employment of a minor, known to be such, contrary to statute constitutes serious and willful misconduct under this section (Sec. 28).

The Act permits insuring in any insurance company and any mutual liability insurance company authorized to do business in the state and approved by the Commissioner of Insurance (Secs. 52 and 53).

4. Court Construction. The Massachusetts Supreme Court in an early opinion determined that an injury to health arising out of and in the course of employment was compensable under the Workmen's Compensation Act. In that case, *In re Hurlie*, 217 Mass. 223, 104 N. E. 336 (1914), the plaintiff suffered the loss of both eyes as the result of inhaling poisonous coal tar gases which escaped from furnaces which he tended in the course of his employment. The Court held, first, that this bodily harm was an injury within the meaning of the Workmen's Compensation Act and, secondly, observed that the Massachusetts Act, as distinguished from the English Workmen's Compensation Act, did not require that an injury be the result of an accident. Compensation was accordingly granted. Following that decision, the Court has granted compensation for disability resulting from lead poisoning where such was

contracted gradually in the course of the employment (*Johnson v. London Guarantee & Accident Co.*, 217 Mass. 388, 104 N. E. 735 (1917)); *O'Donnell's Case*, 237 Mass. 164, 133 N. E. 621 (1921); *Bergeron's Case*, 243 Mass. 366, 137 N. E. 739 (1923); *Grald's Case*, 241 Mass. 229, 141 N. E. 862 (1924); and *Fennell's Case*, 277 Mass. 492, 178 N. E. 655 (1931)); for disability from pneumoconiosis or stonecutter's disease resulting from inhaling granitic dust or silica dust (*Sullivan's Case*, 265 Mass. 497, 164 N. E. 457 (1929)); *Fabrizio's Case*, 274 Mass. 352, 174 N. E. 720 (1931); *Langford's Case*, 278 Mass. 461, 180 N. E. 229 (1932); *DeFilippo's Case*, 284 Mass. 531, 188 N. E. 245 (1933); and *Anderson's Case*, 288 Mass. 96, 192 N. E. 520 (1934)); for disability from pneumoconiosis caused by the inhalation of asbestos dust (*Donahue's Case*, 195 N. E. 345 (1935)); and disability from chronic acid poisoning (*Donahue's Case*, 198 N. E. 149 (1935)).

II. Employers' Liability Acts.

1. Liability of Employers to Employees for Injuries not resulting in Death:

Statutes of Massachusetts Chapter 153.

This act was passed several years before the enactment of the Workmen's Compensation Act and specifically provides a right of action for "personal injury". The most important sections of the act are as follows:

"Section 1. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of—

"First, A defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or

"Second, The negligence of a person in the service of the employer who was intrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or

"Third, The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine, elevated train or train upon a railroad or elevated railway;

"The employee, or his legal representatives, shall, subject to the eight following sections, have the

same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer."

Section 6. This requires any action under this chapter to be commenced within one year "after the accident which caused the injury or death."

No case has been found in which an action has been maintained under this chapter for occupational disease.

2. Actions against an Employer for Death:

Statutes of Massachusetts,

Chapter 229.

This chapter is mentioned, not because it is considered as having any important application to subject of this survey, but because of the possibility of a sudden death from inhalation of gas, so as to give rise to a cause of action thereunder. The important provisions are as follows:

"Section 4. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under section 1 of Chapter 153, an employee is instantly killed, or dies without conscious suffering, the surviving wife or husband of the deceased, or if there is no wife or husband surviving, the next of kin, who, at the time of such death, were dependent upon the wages of the deceased for support, shall have a right of action for damages against the employer. This section shall not apply to injuries caused to domestic servants or farm laborers by fellow employees."

"Section 7. If a cause of action exists against an employer under Section 1 of Chapter 153, or because of the negligence of the employer himself, for an injury resulting in death which is not instantaneous or is preceded by conscious suffering, if there is any person who would have been entitled to bring an action under Section 4, the legal representative of the deceased may, in the action under said Section 1, recover damages both for the injury and for the death, and, if the employer is also liable at common law, may in a separate count in the same action recover damages for conscious suffering resulting from the same injury."

Recovery thereunder is limited to \$10,000.

III. Other Statutes.

1. Labor and Industries:

Statutes of Massachusetts,

Chapter 149.

A. Duties and Powers of the Department of Labor and Industries.

"Section 6. It shall investigate from time to time employments and places of employment, and determine what suitable safety devices or other reasonable means or requirements for the prevention of accidents shall be adopted or followed in any or all such employments or places of employment; and also shall determine what suitable devices or other reasonable means or requirements for the prevention of industrial or occupational diseases shall be adopted or followed in any or all such employments or places of employment; and shall make reasonable rules, regulations and orders applicable to either employers or employees or both for the prevention of accidents and the prevention of industrial or occupational diseases * * *"

Section 8 provides that, before any rule or regulation is adopted, there shall be a public hearing after proper notice has been properly made.

Section 9 permits an appeal to be taken to rules and regulations so adopted.

Section 11 provides:

"The department may require every physician treating a patient whom he believes to be suffering from any ailment or disease contracted as a result of the nature, circumstances or conditions of the patient's employment to report such information relating thereto as it may require, within such time as it may fix, and it may issue a list of such diseases which shall be regularly reported upon by physicians, and may add to or change such list at any time. The department shall pay a fee of fifty cents for each such report. Copies of all such reports and all statistics and data compiled therefrom shall be kept by it, and shall be furnished on request to the department of industrial accidents and the department of public health. No such report shall be subject to summons nor shall its contents be made public."

Section 13 provides:

"No person shall violate any reasonable rule, regulation, order or requirement made by the department under section six or eleven."

B. Work by Women and Children.
Section 54 provides:

"The department shall investigate core rooms where women are employed, and shall make rules regulating the employment of women therein. The rules shall relate to the structure and location of the rooms, the emission of gases and fumes from ovens, and the size and weight which the women shall be allowed to lift or work on. A copy of the rules shall be posted in every core room where women are employed. Whoever violates any such rule shall be punished by a fine of not less than twenty-five nor more than five hundred dollars."

Section 60 prohibits the employment of minors under fourteen years of age in any factory, workshop, manufacturing, mechanical or mercantile establishment, etc.

Section 61 prohibits the employment of minors under sixteen in the operating of certain machines, including circular or hand saws, wood shapers, planers, washing or grinding or mixing machinery, etc.

Section 62 prohibits the employment of a minor under eighteen to work in or about glass furnaces, in the operation or use of any polishing or buffing wheel in or about establishments wherein dangerous explosives are manufactured or compounded, in the manufacture of white or yellow phosphorus or phosphorus matches, etc.

Section 63 provides:

"The Department may, after a hearing duly held, determine whether or not any particular trade, process of manufacture or occupation, in which the employment of minors under the age of sixteen or eighteen is not forbidden by law, or any particular method of carrying on such trade, process of manufacture or occupation, is sufficiently dangerous or is sufficiently injurious to the health or morals of minors under sixteen or eighteen to justify their exclusion therefrom. No minor under sixteen or eighteen shall be employed or permitted to work in any trade, process, or occupation thus determined to be dangerous or injurious to such minors, respectively."

Section 78 provides that the breach of any of the sections dealing with the employment of minors shall be punishable by a fine or imprisonment or both. Each day during which the employment continues constitutes a separate offense.

C. Provisions as to Health and Safety.

Section 113:

"Every factory, workshop, manufacturing, mechanical and mercantile establishment shall be well lighted, well ventilated and kept clean and free from unsanitary conditions, and workrooms therein in actual use shall be properly heated during the winter months, according to reasonable rules and regulations adopted by the Department establishing minimum requirements with reference thereto."

Section 117:

"A factory where five or more persons and a workshop where five or more women or children are employed shall, while work is carried on therein, be so ventilated that the air shall not become so impure as to be injurious to the health of the persons employed therein. A factory, workshop or garage where more than one person is employed shall be so ventilated that all gases, vapors, dust or other impurities injurious to health, whether generated in the course of the manufacturing process or handicraft carried on therein, or otherwise, shall so far as practicable be rendered harmless."

Section 118:

"If, in such a workshop or factory, any process is carried on by which dust is caused which may be inhaled to an injurious extent by the persons employed therein, and it appears to an inspector that such inhalation would be substantially diminished without unreasonable expense by the use of a fan or by other mechanical means, such fan or other mechanical means, if he so directs, shall be provided, maintained and used."

Section 119:

"Any person operating a factory or workshop where emery wheels or belts or buffing wheels or belts injurious to the health of employees are used shall provide such wheels and belts with a hood or hopper connected with suction pipes, and with fans or blowers, in accordance with the following section, which apparatus shall be so placed and operated as to protect any person using such wheel or belt from the particles or dust produced by its operation, and to convey the particles or dust either outside of the building or to some receptacle so placed as to receive and confine them."

Section 120:

"Every such wheel shall be fitted with a hood or hopper of such form and so placed that the particles or dust produced by the operation of the wheel or of any belt connected therewith shall fall or will be thrown into such hood or hopper by centrifugal

force; and the fans or blowers shall be of such size and shall be run at such speed as will produce a volume and velocity of air in the suction and discharge pipes sufficient to convey all particles or dust from the hood or hopper through the suction pipes and so outside of the building or to a receptacle as aforesaid. The hoods or hoppers shall be so constructed and the suction pipes and connections shall be suitable and efficacious and such as shall be approved by the department."

Section 121:

"The two preceding sections shall not apply to grinding machines upon which water is used at the point of grinding contact, nor to solid emery wheels used in sawmills or in planing mills or in other woodworking establishments, nor to any emery wheel six inches or less in diameter used in establishments where the principal business is not emery wheel grinding."

Section 122:

"Violations of sections one hundred and seventeen to one hundred and twenty-one, inclusive, shall be punished for the first offence by a fine of not less than twenty-five nor more than one hundred dollars, and for a subsequent offence by the fine aforesaid or by imprisonment in jail for not more than two months, or both. A criminal prosecution for the violation of section one hundred and seventeen or one hundred and eighteen shall not be begun unless an employer has for four weeks after the receipt of a written order from an inspector neglected to comply therewith."

IV. Administrative Rules and Regulations Adopted by the Department of Labor and Industries Under Authority of the General Statutes.

1. Foundries.

The Department of Labor and Industries will furnish, upon request, Industrial Bulletin No. 10 entitled "Rules and Regulations" relating to safe and sanitary working conditions in foundries and the employment of women in core rooms. This bulletin is comprised of forty-three sections and cannot be reproduced in full in this report. In brief, some of the important provisions of these "Rules and Regulations" are: a definition of "foundry"; requirement that smoke, steam, gases, and dust be removed by hoods, ventilators, fans, or other mechanical means of ventilation approved by the Department of Labor and Industries; adequate means for removal of dust, smoke, steam, or gas from shop rooms where castings are cleaned;

similar provisions with respect to operations of tumbler mills; requirement that suitable respirators shall be provided and worn where cleaning of castings may be injurious to health; the use of suitable helmet or hood in connection with sand-blasting or removing cores by compressed air; and specification as to precautionary measures to be taken in core rooms where females are employed.

The regulations relative to dust, smoke, gases or fumes, ventilation, sanitation, and safety appliances are made applicable to brass foundries; and other special precautions are specified as particularly applicable to brass foundries.

2. Structural Painting.

Industrial Bulletin No. 13 issued by the Department of Labor and Industries may be procured upon request addressed to that Department. It is entitled "Revised Rules, Regulations and Recommendations Pertaining to Structural Painting." Sec. 12 of that bulletin provides as follows:

"(1) Reasonable ventilation shall be provided at all times. Mixing paints by hand shall be done only in well-ventilated places.

"(2) All interior lead-painted surfaces being sandpapered shall be kept sufficiently wet to lay all visible dust arising from the operation.

"(3) When exposed to injury, the operator of spray coating apparatus shall be protected by a respirator or other effective device, and parts of the body not otherwise protected shall be anointed with a harmless, non-drying oil, grease or cream.

"(4) No person shall be permitted to wear any respiratory device which has been worn by another person unless such device has been effectively sterilized since such prior use.

"(5) All respirators and other protective devices shall be subject to approval by the Department, which may require the use of positive pressure devices where compressed air is available.

"(6) Drop cloths shall be kept in reasonably clean condition and shall be shaken out only in the open air.

"(7) A dust-proof receptacle, containing not less than the following first-aid supplies shall be available on all painting operations:

3-1½ mil (c.c.) iodine swabs

1 roll 1" gauze bandage

1 package 6"x36" sterilized gauze

1 roll ½" adhesive plaster

"(8) Water and soap for washing purposes shall be available on all painting operations.

"(9) All means of protection required by the rules of this section shall be provided by the em-

ployer, who shall be responsible for their being kept in effective condition and shall insist on their being worn or used as so required. All means of protection conforming to the rules of this section and furnished to an employee thereunder shall be worn or used by such employee as required by said rules."

Sec. 13 provides for punishment for violation by a fine of not more than \$100.00 for each offense.

V. Common Law Liability.

In our opinion a common law right of action exists in Massachusetts, for the injury or death of an employee caused by the inhalation of dust polluted air in the course of his employment which results proximately from the employer's negligence.

The statement of the Court in *re Hurler*, 217 Mass. 223, 104 N.E. 336 (1914), affords some support for this position. The Court in that case had before it, for the first time, the question as to whether or not an injury resulting from the inhalation of poisonous fumes in the course of employment was compensable under the Workmen's Compensation Act. In order to strengthen its position that such injury was compensable thereunder the Court said, "At common law the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present * * *."

This states quite clearly the more generally accepted rule regarding the right to recover at common law for an injury or death sustained by an employee in the course of his employment.

Thompson v. United Laboratories Co., 221 Mass. 276, 108 N.E. 1042 (1913), a case based upon a cause of action which arose before the Workmen's Compensation Act became effective, lends additional support to the opinion that such a right of action does exist. The plaintiff in that case was injured by inhaling dust from arsenic in rat poison which it was her duty to place in cans. Over a period of approximately four (4) months the plaintiff worked, at intervals, a total of nearly five (5) full days in the filling department. No warning was given plaintiff of the danger; in fact she was informed, upon inquiry, that the powder contained no poison. The defendant, on the other hand, knew that the arsenic was poisonous and that the girls became ill when working with the preparation, but it did not furnish fans to carry off the dust because such was not believed to be necessary. The defendant claimed that plaintiff had assumed the risks of her employment and also that it was not bound to

foresee results of which common experience would not warn and which only a specialist could apprehend. The Court affirmed a judgment in favor of the plaintiff, first, because the plaintiff could not be held to have assumed a risk which was obvious only to those possessing scientific knowledge and, secondly, because, as a matter of law, when an employer engages in a business inherently dangerous to the life and health of employees, he is bound "to become informed of those matters of scientific knowledge possessed by men of general education and information relative to the danger and hazard of the business in which he is engaged."

VI. Miscellaneous Matters of Interest.

1. Statute of Limitations, Chapter 260.

By Section 2, all tort actions must be commenced within six (6) years next after the cause of action accrues. By Section 10, in the event of death before the time expires, or within thirty (30) days thereafter, if the cause of action survives, an action may be commenced by the executor or administrator at any time within which the deceased might have brought the action or within two (2) years after his giving bond for the discharge of his trust. This chapter would apply in those situations not covered by the Workmen's Compensation Act and the Employers' Liability Act (Chapter 153 and Chapter 229).

2. The Granite Industry.

By Chapter 43, Resolves of 1933, a Special Industrial Disease Commission was established to investigate the problem of diseases caused by dust in the granite and foundry industry, of protection from such diseases, and of compensation therefor. Such investigation was deemed necessary because of the almost complete withdrawal of insurance companies from covering employment where dangerous dust conditions were present thereby making it impossible to elect the compensation features of the Workmen's Compensation Act.

As a result of a very complete and comprehensive report by the Special Industrial Disease Commission, rendered February 1, 1934, two bills were enacted by the legislature. By Chapter 331, Acts of 1934, a Division of Occupational Hygiene was created under the Department of Labor and Industries with the duty "to investigate conditions of occupation with reference to hazards to health and to determine the degree of such hazards, to investigate and evaluate methods for the control of such hazards, to assist in the preparation of rules and regulations for the preventing of occupational accidents and diseases, and, in cooperation with the department of public health or other-

wise, to promote occupational health and safety education."

Also, by Chapter 44 of the Resolves of 1934, the Department of Labor and Industries was directed to investigate employments in the granite or silicious industry to determine what suitable safety devices or other reasonable means for the prevention of accidents should be adopted therein, to determine what suitable devices or other reasonable means for the prevention of occupational diseases should be adopted therein, and to make reasonable rules, regulations and orders applicable to all persons engaged in such industry for the prevention of accidents and the prevention of occupational diseases therein.

As yet, no rules or regulations have been adopted by the department under authority of this section. Preliminary thereto, the Division of Occupational Hygiene established and is now conducting a Granite Dust Control Project in the City of Quincy, Massachusetts, in an effort to establish the most economical and efficient means of controlling the dust incident to granite cutting in the small establishments typical to that industry. It is anticipated that within a few months the Department of Labor and Industries will develop a complete system of rules to be observed by employers in the granite or silicious industry.

Information concerning the Granite Dust Control Project can be had by addressing communications to The Division of Occupational Hygiene, 23 Joy Street, Boston, Massachusetts.

CHAPTER XXIV MICHIGAN

1. Workmen's Compensation Act.

1. Statutes. Compiled Laws of Michigan, 1929, Secs. 8407-8485.

2. Administration. The Act is administered by three of the four commissioners of the Department of Labor and Industry designated by the chairman of that Department to administer the Act. The members of the Department are appointed by the Governor, with the advice and consent of the Senate. Communications may be addressed to the Department of Labor and Industry at Lansing, Michigan.

3. Scope of the Act. The purpose of the Act, as stated in the preamble, is "to promote the welfare of the people of the state, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to or death of employees and methods for the payment of the same * * * and restricting the right to compensation or damages in such cases to such as are provided by this act." The word "accident" appears in many sections of the Act, among which are Secs. 8411, 8416, 8423, 8431, 8452, and 8456. No mention is made in the Act of "diseases," occupational or otherwise. (But see Section IV, 2, of this chapter as to prospective legislation.)

Sec. 8417 provides:

"If an employee who has not given notice of his election not to be subject to the provisions of this act, as provided in part one (1), section eight (8), or who has given such notice and has waived the same as hereinbefore provided, receives a personal injury arising out of and in the course of his employment by an employer who is at the time of such injury subject to the provisions of this act, he shall be paid compensation in the manner and to the extent hereinafter provided, or in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined."
(Bold face type ours.)

It has been determined by the Supreme Court of Michigan that the Act covers only **accidental** injuries or death and that occupational diseases are not compensable thereunder because such cannot be deemed to result by accident. (See subsequent

Sec. 1, 4A, of this chapter, which reviews the court constructions of this Act.)

The Act, which covers practically all private employers and their employees (Sec. 8411), is elective as to both. The employer elects to be bound by the Act by filing an acceptance as required (Sec. 8412). An employee of an employer who has accepted the Act is presumed to have accepted it in the absence of notice to the contrary (Sec. 8414).

If an employer does not accept the Act, he loses the defenses of contributory negligence (except where wilful), assumed risk, and negligence of fellow servant in an action brought against him by an employee to recover damages for personal injury or death sustained by such employee in the course of his employment (Sec. 8407). Where such an action is brought against an employer who has elected to be bound by the Act, these defenses are available (Sec. 8409). Where both employer and employee have elected to be bound by the Act, the employer is not "subject to any other liability whatsoever, save as herein provided for the death of or personal injury to any employee, for which death or injury compensation is recoverable under this act, * * *" (Sec. 8410). Where the employee of an employer subject to the Act, or his dependents, accept any payment from the employer, from the insurance company carrying the risk of liability, or from the Commissioner of Insurance, on account of personal injury, or make any agreement or submit any question to arbitration under the Act, such constitutes a release to the employer of all claims at law arising from such injury (Sec. 8478).

Notice of an injury must be given within three months, and a claim made within six months after the occurrence thereof, or, in case of death, within six months after the death, provided that where an employer receives notice or has knowledge of an injury within three months of its happening but the disability does not develop until after six months from the happening thereof, a claim may be made within three months after the actual disability so long as it is within two years from the date the injury was sustained (Sec. 8431).

Employers who elect to be bound by the Act may specify, with the approval of the Commission, whether they will, upon furnishing adequate proof of their own financial ability, make payments direct to employees or insure their liability under the Act in some authorized employers' liability company, in some employers' insurance association, or by payments into the State Accident Fund (Sec. 8460).

4. Court Construction.

A. Accidental Injuries. The question whether or not an occupational disease is compensable under the Act first came before the Supreme Court of the state in *Adams v. Acme White Lead Co.*, 182 Mich. 157, 148 N. W. 485 (1914), a case frequently cited in other jurisdictions. Therein recovery was sought under the Workmen's Compensation Act for the death of an employee from lead poisoning sustained in the course of his employment in defendant's plant from December 18, 1912, until May 29, 1913, a period of about five months.

The Commission construed "personal injury," as used in the Act, as broad enough to include lead poisoning and held that injury by accident was not necessary to warrant granting of compensation. The Commission held this ailment to be an "occupational disease" but, nevertheless, compensable because it was a "personal injury."

The Supreme Court reversed the award. In an extensive analysis of the Workmen's Compensation Act, the court emphasized the language found in the preamble, which states the purpose of the Act, and also the repeated use of the word "accident" in the Act. It concludes that the whole scope and purpose of the Act was to provide compensation for "accidental injuries" as distinguished from "occupational diseases"; that "accident" is the controlling word in our act; and that "it was not the intention of the Legislature to provide compensation for industrial or occupational diseases."

In reaching this conclusion, the court quotes with approval the definition of "accident" in *Black's Law Dictionary* as

"An unforeseen event, occurring without the will or design of the person whose act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casually."

The court quotes the definition of "occupational disease" found in *Century Dictionary and Cyclopedia*, viz: "A disease arising from causes incident to the patient's occupation, as lead poisoning among painters." The court points out as significant that lead poisoning does not arise suddenly but comes only after long exposure; that it is not the result of one contact or a single event; that precautions are taken against it; that contracting the disease depends upon the physical condition, care, and peculiarity of the individual; and that the amount of time it will take to produce ill effects or death varies as to individuals.

As a further basis for its conclusion, the court discusses the meaning of "personal injury," as used in the Act, and says that, manifestly, the term refers to common law conditions and liabilities and does not refer to and include occupational disease, "because an employee had no right of action for injury or death due to occupational disease at common law, but, generally speaking, only accidents, or, rather accidental injuries, gave a right of action." (For a further discussion of the common law right of action, see Sec. III of this chapter.)

Note:

The foregoing case has been followed in Michigan without modification and was reaffirmed in the recent case of *Tworck v. Munising Paper Co.*, decided April 6, 1936, and hereinafter discussed; but in that case, it was vigorously attacked in the dissenting opinion of Mr. Justice Potter.

Another early case which is enlightening as to what the Michigan courts consider as being an occupational disease is that of *Jerner v. Imperial Furniture Co.*, 200 Mich. 265, 166 N. W. 943 (1918). There the plaintiff sought compensation for disability resulting from a germ infected hand. The plaintiff worked for twenty days in defendant's plant staining mahogany furniture. It was necessary to completely immerse the article to be stained in dye, and in so doing, the plaintiff had to put his hands in the staining liquid. On a fixed date, the flesh began to open up on his hands. The court said that if the injury occurred by reason of the character of the work, compensation would be denied, since the Act does not grant compensation to those suffering injury from occupational diseases. The period of exposure to the danger was less than eleven working days; yet the court considered that such would nevertheless constitute an occupational disease, because those engaged in dyeing furniture frequently suffer from sore hands. Compensation was denied.

That a disease may be compensable if it arose by accident was decided by the court in *Dove v. Alpena Hide and Leather Co.*, 198 Mich. 132, 164 N. W. 253 (1917). In that case, an employee's death resulted from "septic infection and heart trouble" caused by an infection from the dust arising when diseased hides were handled in unloading. On April 1st, the deceased noticed a swelling on his neck; on April 2nd, he was advised by the foreman to see a doctor; and on April 4th, he died from the disease. The court pointed out that it was by chance that the germ was taken into his system and that such

was unusual in the work at which he was engaged, and therefore held that the occurrence was "accidental." Allowance of compensation was affirmed.

In *Perkins v. Jackson Cushman Spring Co.*, 206 Mich. 98, 172 N. W. 374 (1919), the disability for which the plaintiff sought compensation resulted from the development of a bone felon on his hand. For a period of six years the plaintiff had been employed in putting strips in metal frames by the use of a pair of pliers, and it was in this work that the bone felon developed. The court refused compensation on the ground that there was no injury by accident, since there was no evidence of the intervention of any untoward or accidental happening producing the injury; there was no blow or sudden strain, but, in fact, the injury resulted from the continuous use of the pliers over a long period of time.

Williams v. Misouril Bridge & Iron Co., 212 Mich. 150, 180 N. W. 357 (1920), involves a claim under the Act for disability from caisson disease. Men working under pressure in caissons will develop the disease unless, in being taken therefrom, the pressure change is made slowly. The claimant's husband, while being taken from a caisson in which he had been working, was, by the negligence of an employee, subjected to a sudden release of air. He became dizzy, fell, hit his head on a shaft and died shortly thereafter. In granting compensation, the court made this interesting statement:

"* * * It is true the testimony establishes the fact that caisson disease develops by the slow process, the same as occupational diseases usually do. Had Williams contracted caisson disease in this manner and his injury and death had resulted therefrom, the argument of counsel would have great force, but the caisson disease, which was responsible for this accident, developed in a few minutes as the result of the inattention and neglect of another. In this inattention and neglect we find the unusual thing—the happening—the accident."

In *Taylor v. Everts*, 261 Mich. 558, 246 N. W. 496 (1933), compensation was granted for an injury resulting from chemical dust getting into plaintiff's eye while clipping apples from a tree in defendant's orchard. This was held to be an injury by accident because of the unusual condition and because the injury was unexpected, not foreseen, and occasioned fortuitously.

In *Sherman v. Winkelman Bros. Apparel, Inc.*, 262 Mich. 214, 247 N. W. 159 (1933), compensation was awarded claimant for injuries caused by handling a shipment of low-priced, dyed furs.

In *Dailey v. River Raisin Paper Co.*, 269 Mich. 443, 257 N. W. 857 (1934), the plaintiff brought his action at law for disability resulting from inhaling poisonous fumes on a specific day while working on the interior of a tank. It was not properly ventilated and the fumes penetrated a damaged and useless gas mask and were breathed by the plaintiff. The plaintiff first sought recovery under the Workmen's Compensation Act, but the Board denied compensation on the ground that no accidental injury was involved. The plaintiff did not appeal that decision but instead filed his action at law, alleging negligence on the part of the defendant. The court held that the injury resulted from an accident; and, consequently, since both parties were bound by the Workmen's Compensation Act, the plaintiff's exclusive remedy was thereunder. The plaintiff should have appealed the decision of the Board, and not having done so, he was remediless. The court expressly declared that it was unnecessary for it to decide whether or not an action would lie at common law for an occupational disease after an employee had unsuccessfully attempted to recover therefor under the Workmen's Compensation Act.

In *Tomlanovich v. American Boston Mining Co.*, 272 Mich. 493, 262 N. W. 293 (1935), compensation was granted when plaintiff was disabled as a result of being overcome by carbon monoxide gas when an air line failed to work while he was engaged in drilling preparatory to blasting mine ore. Such was held to be an accidental injury.

In *Tworck v. Munising Paper Co.*, 266 N. W. 311 (Sup. Ct., April 6, 1936), the plaintiff brought an action at law for disability resulting from the inhalation of chlorine gas on two successive working days. Plaintiff had previously filed a claim for compensation under the Workmen's Compensation Act but such had been denied on the ground that he was not suffering from an accidental injury. No appeal was taken from that decision. The plaintiff contended that the defendant was estopped in the present action from claiming that compensation was recoverable under the Act; and was estopped to deny jurisdiction of a court of law on the ground that the plaintiff had suffered "accidental injury," when the defendant had successfully defended before the Commission's arbitrators on the ground that the injury was not "accidental". The court dismissed plaintiff's action, stating that the injury was accidental and that, since both parties were under the Workmen's Compensation Act, plaintiff had released all claims against the defendant when he submitted the question of the injury to arbitration under the Act. The court also stated that under the

Act "the plaintiff's claim was not erroneously filed (with the commission), though it may have been erroneously decided, but this he did not question by appeal." * * * The unappealed determination of the department, through its deputy commissioner is res adjudica."

It is interesting to note that in this case the court recognizes an attack made upon its former decision in *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 405 (1914), *supra*, and that, after an extended discussion of the Workmen's Compensation Act, the court recognized that decision as sound.

A strong dissenting opinion in this case was written by Mr. Justice Potter. He recognized the fact that for over twenty years the *Adams* case has been continually followed in Michigan; but he says, "The decision in that case is based upon false premises and disregards the plain language of the statute." He refers to the assumption of the court in the *Adams* case that an employee had no right of action for injury or death due to an occupational disease at common law, and answers it by saying that the basis of recovery at common law for an injury suffered by an employee was the tortious act or failure to act, of the employer. He states that if the Workmen's Compensation Law had been properly construed in the first instance, i. e., in the *Adams* case, the disease from which the plaintiff is alleged to be suffering as a result of gas poisoning, to which he was subjected in the course of his employment, would be covered by the Act.

The dissent goes further and disagrees with the conclusion reached in the majority opinion, on the ground that under the previous decisions the disability suffered in this instance was not due to accident. An accident, he says, does not last two days. Therefore, the Commission did not have jurisdiction of the matter in the first instance, and its decision could not amount to res judicata. Hence the plaintiff was free to pursue an action at law based upon negligence.

This dissent may indicate a trend of thought which will result in modification of the law as announced over twenty years ago in the *Adams* case and which to date has not been changed by a majority opinion of the Michigan Supreme Court.

B. Exclusiveness of the Act.

Ily Sec. 8410,

"Any employer who has elected * * * to pay compensation as hereinafter provided, shall not be subject to the provisions of section one (1)." (Sec.

8407): "nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of or personal injury to any employee, for which death or injury compensation is recoverable under this act, except as to employees who have elected in the manner hereinafter provided not to be subject to the provisions of this act."
(Bold face type ours.)

Sec. 8478 provides:

"If the employee, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury."
(Bold face type ours.)

The question arises under both of these sections as to just what is their effect upon causes of action for which no compensation can be recovered under the Act.

The former of these two sections was construed by the court in *Oleszek v. Ford Motor Co.*, 217 Mich. 318, 186 N. W. 719 (1922). The action was at law for the loss of a leg as the result of an injury and improper attention thereafter. Since both parties had elected the Act, the court held that, by virtue of Sec. 8410, the plaintiff was "barred of his remedy for any damages to which he would have been entitled at common law, which flow from the injury due to the accident. If, under the facts stated, compensation would have been awarded under the act, this action will not lie." (Bold face type ours.) Judgment was for the defendant on the ground that his injury was compensable under the Act. It can be inferred, however, from the court's statement and from the fact that it devoted much of the opinion to showing that the injury was compensable under the Act that if the injury had not been compensable thereunder, the plaintiff would have been permitted to recover in his law action.

Another statement to this effect appears in *National Biscuit Co. v. Litzky*, 22 F. (2d) 939 (C.C.A. 6th, 1927), where the plaintiff sought to recover at law for injuries sustained when an elevator in which plaintiff was riding fell. The defendant contended that an attempted discharge was invalid; and since both parties had elected the Act, the plaintiff, by virtue of Sec. 8410, was precluded from any suit at law for the injuries. The

court, in assuming the relationship of master and servant to continue, said:

"Under the provisions of this act the right of the plaintiff to maintain an action is defeated only where compensation is recoverable, and compensation is recoverable only where the injury arises out of and in the course of the employment."
(Bold face type ours.)

It was accordingly held that plaintiff's right of action was not barred by this section of the Act, since the injury did not arise out of and in the course of employment.

The opinion of the dissenting judge in the recent Supreme Court decision, *Tworck v. Munising Paper Co.*, 266 N. W. 311, 315 (April 6, 1936), *supra*, contains this statement:

"* * * The common law rights of an employee were not abolished by the Workmen's Compensation Law unless covered by its terms. The common law remedy of an employee for his own negligent injury by his employer was not taken away except where a substitute remedy was provided. The statute gives a substitute remedy only in those cases where 'compensation is recoverable under this act.' * * * Sec. 8410. This leaves all those cases where compensation is not recoverable under the act as they stood before the passage of the act, and is an express statutory recognition there may be cases where the injured employee is entitled to recover at common law because not entitled to recover under the terms of the act."

The court also had Sec. 8410 before it in *Varga v. Detroit Edison Co.*, 240 Mich. 593, 216 N. W. 374 (1927) and *Simon v. Cadillac Motor Car Co.*, 242 Mich. 93, 218 N. W. 663 (1928), but in neither case does it appear that the injury for which the lawsuit was brought was not compensable under the Act.

It cannot therefore be said with certainty that, where both employer and employee have elected the Act, Sec. 8410 alone will preclude the bringing of an action by such employee against his employer at common law for a disability resulting from an occupational disease. The courts may eventually recognize a common law right of action and determine that the Act will bar such right of action only when compensation can be recovered under the Act.

Sec. 8478, *supra*, has been construed in *Gray v. Brown & Sehler Co.*, 200 Mich. 177, 166 N. W. 930 (1918); in *Brabon v. Gladwin Light & Power Co.*, 201 Mich. 697, 167 N. W. 1024 (1918); in *Grand Rapids Trust Co. v. Peterson Beverage Co.*,

219 Mich. 208, 189 N. W. 186 (1922); and in *Sotonyl v. Detroit City Gas Co.*, 251 Mich. 393, 232 N. W. 201 (1930). It does not appear, however, in any of these cases, that the action at law was based upon a set of facts for which there was no recovery under the Workmen's Compensation Act, and the cases, therefore, do not determine the full effect of the section.

The opinion of the dissenting judge in *Tworck v. Munielag Paper Co.*, 266 N. W. 311, 320, *supra*, expressly states that the above section operates only upon persons and injuries subject to the Act.

The court, in *Dailey v. River Raisin Paper Co.*, 269 Mich. 443, 257 N. W. 857, *supra*, decided December 10, 1934, said:

"Whether, notwithstanding the language of the above sections," (8410 and 8478) "an employee can have recovery in a court of law for an occupational disease, after having unsuccessfully sought the aid of the commission, is a question which is unnecessary to determine on this appeal. * * *

It seems from this statement that the question is an open one, not yet determined by the Michigan courts.

11. Other Statutes—(Labor—Title 17).

1. Department of Labor and Industry, Ch. 149.
Secs. 8324 to 8326 deal with employment of females and children in industry. The length of the sections precludes their being copied herein, but it is advisable that those employers affected thereby make a careful study of them.

Sec. 8331 "Exhaust fans shall be provided for the purpose of carrying off dust from emery wheels and grindstones and dust-creating machinery, wherever deemed necessary by the factory inspector."

Sec. 8341 " * * * Whenever a foundry is so constructed or operated that smoke, steam, dust or noxious gases are not promptly carried off by the general ventilation, exhaust fans shall be provided. No salamanders or open fire places shall be used, unless ample provision be made for conveying the gases arising therefrom directly from the building. * * *

Sec. 8342 "All persons, companies or corporations operating any factory or workshop, where wheels or emery belts of any description are in general use, * * * shall provide the same with fans or blowers or similar apparatus, which shall be placed in such a position or manner as to protect the person or persons using the same from the particles of dust produced and caused thereby, and to carry the dust arising from, or thrown off by such wheels or belts

while in operation, directly to the outside of the building or to some other receptacle placed so as to receive and confine such dust: Provided, That grinding machines upon which water is used at the point of grinding contact shall be exempt from the conditions of this act: Provided, further, That this act shall not apply to solid emery wheels used in saw-mills or planing-mills or other wood working establishments."

Sec. 8343 "It shall be the duty of any person, company or corporation operating any such factory or workshop to provide or construct such appliances, apparatus, machinery or other things necessary to carry out the purposes of this act, as set forth in the preceding section, as follows: Each and every such wheel shall be fitted with a sheet or cast iron hood or hopper of such form and so applied to such wheel or wheels that the dust or refuse therefrom will fall from such wheels or will be thrown into such hood or hopper by centrifugal force and be carried off by the current of air into a suction pipe attached to such hood or hopper."

Sec. 8344 makes specific provisions in regard to the sizes of suction pipes for such wheels.

Sec. 8345 makes it the duty of employers to provide necessary fans and blowers to be connected with such pipes and to operate the same at a fixed velocity. Provisions are also made in regard to pipe angles, bends, turns, and elbows.

Sec. 8346 " * * * No person shall be employed to operate any of the wheels, buffers or belts mentioned in this act in any basement, so-called, or in any room lying wholly or partly beneath the surface of the ground unless such workroom shall be provided with sufficient means of light, heat and ventilation as shall be prescribed by the state factory inspector. No female shall be employed in operating or using any of the wheels or belts specified in this section."

Sec. 8347 "All persons, companies or corporations operating any upholstering or mattress establishments or other establishments, factory or place where hair, moss, tow or cotton is used for filling, shall provide the same with hair picking machines when ordered by the commissioner, deputy commissioner of labor or deputy factory inspector, which shall be placed in such a position or manner as to carry away the dust arising from or thrown off by such machines while in operation directly to the outside of the building or to some other receptacle established so as to receive and confine such dust, and the same shall be placed within such establishment, place or factory within three months after having been ordered to be so placed by the

commissioner, deputy commissioner of labor or deputy factory inspector."

Sec. 8354 provides the penalty, or a breach of any of the provisions of the Act.

2. Coal Mines, Ch. 152.

Sec. 8546 provides the amount of air to be supplied employers working in the mine. Such air must be distributed so as to give all employees air of reasonable purity to keep the working places in a healthy condition, free from noxious gases and deleterious air, with a limited number of men on each split. Where explosive gases are generated, the quantity permitted in a mine is specifically limited.

Sec. 8551 provides that when gasoline engines are used in coal mines, the exhaust must be cared for and the gasoline pumps must be placed in such position that the fumes from the pumps will not vitiate the air or injure the health of the employees. Only a limited supply of gasoline can be taken into the mines and then only in sealed metal tanks specially constructed.

Sec. 8560 provides that escape ways are to be ventilated and kept free from vitiated air.

3. Miscellaneous Labor Regulations, Ch. 154.

Sec. 8613 "Every physician attending or called upon to treat a patient whom he believes to be suffering from poisoning from lead, phosphorus, arsenic or mercury, or their compounds, or from anthrax, or from compressed air illness, contracted as a result of the nature of the patient's employment, shall send to the state board of health, who shall transmit to the commissioner of labor a notice stating the name, postoffice address and place of employment of the patient, the length of time of such employment, and the disease from which in the opinion of the physician, the patient is suffering."

Sec. 8614 provides that the failure by a physician to so report, or his making of a false statement wilfully in such report, constitutes a misdemeanor punishable by fine.

Note:

All of the foregoing "Other Statutes," and others of general interest, are contained in a pamphlet entitled "Labor Laws," published, and distributed, upon request, by the Department of Labor and Industry of Michigan, which may be addressed at Lansing.

III. Common Law Liability.

Because of certain statements of the Michigan Supreme

court in *Adams v. Acme White Lead and Color Works*, 182 Mich. 157, 148 N. W. 485 (1914), *supra*, it has been considered settled that in Michigan an employee does not have any common law right of action against his employer for a disability resulting from an occupational disease, and this would include disease caused by exposure to dust.

In that case, the court, in speaking of the Workmen's Compensation Act and the terms appearing therein, said:

"* * * Manifestly, the terms 'personal injury' and 'personal injuries,' above mentioned, refer to common-law conditions and liabilities, and do not refer to and include occupational diseases, because an employee had no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only accidents, or, rather, accidental injuries, gave a right of action. We are not able to find a single case where an employee has recovered compensation for an occupational disease at common law. Certainly it can be said that in this state no employer has ever been held liable to the employee for injury from an occupational disease, but only for injuries caused by negligence. It seems to us that the whole scheme of this act negatives any liability of the employer for injury resulting from an occupational disease."
* * * (Bold face type ours.)

It is possible that the court, when it made these statements, was considering occupational disease in its narrow sense; that is, a disease prevalent in an industry which gradually affects a certain percentage of the workers therein despite elaborate precautions on the part of the employer, and which occurs without any negligence on the part of the employer and in spite of all due care on his part. Under such a definition, it is clear that the right of recovery for an occupational disease would not exist at common law, because at common law there could be no recovery against a master in the absence of the showing of negligence on his part.

The Supreme Court apparently is not inclined to modify or limit the doctrine of the *Adams* case, as is indicated by its review of the common law right in *Tworck v. Munising Paper Co.*, 266 N. W. 311 (April 6, 1936), *supra*. In that recent case, however, the dissenting judge declared:

"* * * The assumption of the court in that case" (*Adams v. Acme White Lead Co.*) "that an employee had no right of action for injury or death due to an occupational disease, at common law, but that, generally speaking, only accidents, or rather acci-

in injuries, gave a right of action is clearly rect. * * *"

He asserted that the common law permitted a recovery by an employee for any injury received during his employment resulting from the employer's negligence.

The case of *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 48 N. W. 203 (1891), which arose before the Workmen's Compensation Act was adopted, involved an injury similar to that in *Adams v. Acme White Lead & Color Works*, supra. The action was at law to recover for damages resulting from inhaling poisonous fumes and vapors from certain vats while in defendant's employment for a period of only five days. The judgment in the lower court had been for the defendant, but that judgment was reversed and a new trial granted. The plaintiff's testimony tended to show that defendant knew of the dangerous substance of the vats and the dangerous character of the fumes given off and yet not only was there a failure to warn the plaintiff, but the superintendent had been instructed not to give such warning. The court declared it to be the duty of the defendant "not only to inform the plaintiff that it was a poison, but of the effect it might produce on one working in its manufacture without taking due precaution, and the precaution necessary to be taken should have been pointed out, if known to the defendant, and all proper and reasonable appliances and facilities provided to guard against the dangers to be encountered in the employment." The case clearly indicates that the plaintiff had a cause of action at common law for an injury due to a disease based upon the employer's negligence in breaching some duty owed the plaintiff employee.

The more recent case of *Koeteler v. Cargill Co.*, 241 Mich. 370, 217 N. W. 51 (1928), involves an action at law for damages resulting from lead poisoning caused by the inhalation of poisonous fumes while plaintiff was employed for a year and a half in operating a monotype caster in defendant's printing and engraving establishment. The plaintiff maintained that since an occupational disease was not compensable under the Workmen's Compensation Act, he had an action at common law for the negligence of the master, which resulted in his contracting the disease. The court held for the defendant on the ground that the plaintiff had failed to show any negligence on the part of the defendant because, since this was the first case of such an injury in monotype operations, the defendant did not know or could not be held to have known of the danger. The court did not comment upon one of defendant's conten-

tions to the effect that no common law action for an occupational disease could be maintained.

Until the case of *Adams v. Acme White Lead*, supra, is reversed or modified, no cause of action at common law will be recognized in Michigan for occupational disease, whether caused by negligence or otherwise.

IV. Miscellaneous Matters of Interest.

1. **Statute of Limitations.** Actions to recover damages for injuries to the person must be brought within three years from the time said action accrues and not afterward (Sec. 13976 (2)). If death occurs before the expiration of this limitation, or within thirty days after the expiration of such time, an action may be brought within two years after granting letters testamentary or of administration, provided that in no event shall an action be brought by an executor or administrator unless commenced within three years of the time limited in this chapter (Sec. 13981).

2. **Surveys and Pending Legislation.** By an act effective June 6, 1935, (Act No. 164, Public Acts of 1935), a special commission of inquiry was created consisting of five persons to be appointed by the Governor. That commission is to investigate the problems involved in workmen's compensation for occupational diseases and to inquire into the comparative efficiency and cost of the Workmen's Compensation Acts of other jurisdictions dealing with those subjects. The commission is to prepare and submit to the next Legislature or to a special session of the present Legislature called for such purpose a full report, including a form of law which, in their opinion, will meet the requirements of the subject. At the present time the commission is engaged in that investigation, but no report on the progress thereof is available.

CHAPTER XXV
MINNESOTA

Workmen's Compensation Act.

1. Statutes. *Masons Minnesota Statutes 1927, Secs. 4261-4337.*

2. Administration. The Act is administered by the Industrial Commission of Minnesota, composed of three persons appointed by the Governor, by and with the advice and consent of the Senate, for terms of six years each. Communications may be addressed to the Commission at St. Paul, Minnesota.

3. Scope of the Act. The compensation feature of this act is wholly elective. Both the employer and employees must elect to operate under it in order to entitle the employees to compensation. Such election will, however, be presumed from failure to elect not to operate under the Act. The Act is divided into two "Parts".

Part 1. (Sections 4261-4267).

These sections do not provide for compensation, but for damages in an action at law in favor of any employee "when personal injury or death" is caused "by accident" arising out of and in the course of his employment, due to the negligence of the employer and, in case of death, such right to recover damages is given to the employee's personal representative. (Sec. 4261).

In such actions for damages the employer is denied the common law defenses of contributory negligence, negligence of fellow servant, and assumed risk. (Sec. 4262).

It is then provided specifically that an employer, who elects not to come under Part 2, shall be denied the three defenses above named in any action brought under Part 1. (Sec. 4263).

But, if the employer elects to come under Part 2 and the employee does not so elect, the employer is not denied the common law defenses in an action brought under Part 1. (Sec. 4264).

Part 2. (Sections 4268 to 4337-5)

By these sections, workmen's compensation is provided without regard to negligence of the employer, in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment, "if both em-

ployer and employee shall, by agreement, expressed or implied, or otherwise as herein provided, become subject to part 2." (Sec. 4269).

Certain occupational diseases are made compensable by the terms of Section 4327, which provides in substance:

"(1) The disablement of an employee resulting from an occupational disease described in sub-section (9) of this section, except where specifically otherwise provided, shall be treated as the happening of an accident within the meaning of Part 2 of this act and the procedure and practice provided in such Part 2 shall apply to all proceedings under this section, except where specifically otherwise provided herein. Whenever used in this section, 'disability' means the state of being disabled from earning full wages at the work at which the employee was last employed, and 'disablement' means the act of becoming so disabled." (Bold face type ours.)

(2) provides for proportionate reduction of compensation if the employee is able to earn wages at another occupation.

"(3) Neither the employee nor his dependents shall be entitled to compensation for disability or death resulting from disease unless the disease is due to the nature of his employment and contracted therein within the twelve months previous to the date of disablement, whether under one or more employers. (Bold face type ours.)

"(4) If an employee at the time of his employment, willfully and falsely represents in writing that he has not previously suffered from the disease which is the cause of disability or death, no compensation shall be payable.

"(5) The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, such disease was contracted while such employee was in the employment of a prior employer, the employer who is made liable for the total compensation as provided by this sub-section, may appeal to the commission for an apportionment of such compensation among the several employers who since the contraction of such disease shall have employed such employee in the employment to the nature of which the disease was due. Such apportionment shall be proportioned to the time such employee was employed in the service of such employers, and shall be determined only after a hearing, notice of the time and place of which shall have

been given to every employer alleged to be liable for any portion of such compensation. If the commission find that any portion of such compensation is payable by an employer prior to the employer who is made liable to the total compensation as provided by this sub-section, it shall make an award accordingly in favor of the last employer, and such award may be enforced in the same manner as an award for compensation.

"(6) The employer to whom notice of death or disability is to be given, or against whom claim is to be made by the employer shall be the employer who last employed the employee during the said twelve months in the employment to the nature of which the disease was due and in which it was contracted, and such notice and claim shall be deemed seasonable as against prior employers."

(7) Requires employees to give information as to previous employers.

(8) Provides that the enumerated, compensable diseases, respectively, shall be presumed to have been due to the occupation set opposite each in the schedule in sub-paragraph (9), if the employee was employed in such occupation at, or immediately before, the date of disablement.

(9) In this sub-paragraph are enumerated twenty-three compensable occupational diseases, including anthrax, eleven types of poisoning, chrome ulcer, epitheliomatous cancer, glanders, compressed air illness, six ailments presumably common to mining, and cataract in glass workers.

The list does not include silicosis or any other dust disease.

"(10) Nothing in this section shall affect the rights of an employee to recover compensation in respect to a disease to which this section does not apply if the disease is an accidental personal injury within the meaning of the other provisions of Part 2 of this act.

"(11) The provisions of this section shall not apply to disability or death resulting from a disease contracted prior to the date on which this act takes effect."

Section 4270 provides that agreement or election to become subject to Part 2 "shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in part 2 of this Act * * *."

Inasmuch as disablement from any one of the enumerated oc-

cupational diseases is to be "treated as the happening of an accident" and the procedure and practice provided in Part 2 shall apply to all proceedings under this Section (the occupational disease section—4327)," the following general provisions which are applicable to both traumatic injury and occupational disease, are of interest.

The maximum compensation payable for temporary total disability is \$6,000 (Sec. 4274 (a)), for permanent partial disability \$6,000 (Sec. 4274 (c)), for permanent total disability \$10,000 (Sec. 4274 (a)), and for death \$7,500 plus an amount not to exceed \$150 for burial expenses (Sec. 4275 (18) and (19)).

Unless knowledge is obtained by an employer or notice is given him within ninety days after the occurrence of the injury, no compensation will be granted (Sec. 4280). The employee's action for compensation must be brought within two years after the employer's written report to the Commission, but not longer than six years from the date of the accident. Dependents must bring their action within two years after the receipt, by the Commission, of the notice of death given by the employer, but not longer than six years from the date of the accident (Sec. 4282).

Every employer who has elected part two must insure the payment of such compensation with some authorized insurance company unless exempted by the Commission upon proof of his financial ability to pay such compensation and, in addition, where the Commission desires, a deposit of adequate security. A failure to secure payment of compensation subjects the employer to a \$50 penalty payable to the State, and continual non-compliance subjects him to liability to the State for five times the lawful premium (Sec. 4288).

In Sec. 4326 (b) the term "accident" is defined as follows:

"The word 'accident' as used in the phrases 'personal injuries due to accident' or 'injuries or death caused by accident' in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing at the time injury to the physical structure of the body." (bold face type ours.)

It should be noted that the provisions for compensation for the enumerated occupational diseases operate only in case of election by both employer and employee to take advantage of the Act. If both or the employer alone should elect not to take advantage of it, the employee could bring an action at law

under Part 1 and the employer would be denied the common law defenses. If the employer alone elects to operate under Part 2, the compensation provisions would not become operative; but if sued at law, the employer would not be denied the common law defenses.

4. Court Construction.

A. Injuries by Accident.

Donnelly v. Minneapolis Mfg. Co., 161 Minn. 240, 201 N. W. 305 (1924), was one of the early leading cases to be decided in Minnesota dealing with occupational diseases. The plaintiff therein brought an action at law to recover damage for, as alleged, "an occupational disease" known as "chronic bronchitis with chemical poisoning." The negligence on which the action was based was the employer's failure to provide proper and sufficient means of ventilation so as to prevent unlawful accumulations of dust as required by statute. Both parties were under the Workmen's Compensation Act, and plaintiff had filed his claim thereunder, but the Board had refused compensation. The court overruled the defendant's demurrer to the plaintiff's petition on the grounds that, since the injury was not compensable under the Workmen's Compensation Act because it was not an accidental injury or one of the occupational diseases specifically enumerated in the Act, an action at law would lie because the Act is a substitute for the common law only as to subjects which it covers, and it does not affect rights and wrongs not within its purview.

In *Manley v. Harvey Lumber Co.*, 178 Minn. 489, 221 N. W. 913 (1928), where death was caused by the inhalation of carbon monoxide gas while working on an automobile in a closed garage, such was held to be death by accident arising out of and in the course of employment, for which compensation was granted.

Suess v. Arrowhead Steel Products Co., 180 Minn. 21, 230 N. W. 125 (1930), involved an action at law for damages to the plaintiff's health caused by the inhalation of dust during six years' employment by the defendant as superintendent and inspector of its factory. The negligence alleged was the failure to provide sufficient ventilation to remove, as far as practicable, dusts which were injurious to the health or safety of employees, as required by statute. The court granted the plaintiff's motion for a new trial on the ground that the lower court erred in submitting to the jury the question of assumed risk, since, where an action is based on a violation by the employer of a statute, assumption of risk is not a defense open to the em-

player. The court, in addition, cited *Donnelly v. Minneapolis Mfg. Co.*, *supra*, as authority for its position that the injury was one for which there was no compensation under the Workmen's Compensation Act.

Compensation was granted under the Act in *Adler v. Interstate Power Co.*, 180 Minn. 192, 230 N. W. 489 (1930), for the death of an employee who for some time had been employed as a stoker in defendant's plant. The evidence disclosed that there was an unusual exposure on a certain date to the fumes of coal and coke, which resulted in almost instantaneous sickness from which he died a few hours after being taken home. The autopsy also revealed that the body was that of a healthy individual.

The court awarded compensation in *Keane v. Arrowhead Steel Products Co.*, 181 Minn. 359, 232 N. W. 621 (1930), for the death of an employee engaged in operating a machine which finished piston castings. The deceased frequently received puncture wounds from flying particles of metal, and he was accustomed to pick such out with a needle at night. Death resulted from tetanus, which, according to the physician's testimony, entered the system through the puncture wounds. The wounds were held to be the proximate cause of the death. The defendant claimed that employee's case failed because there was no proof that the disability was due to any particular scratch. The court however held, on the strength of an English case, that the injury was no less accidental because it occurred on a series of occasions rather than on just one.

Jurovich v. Interstate Iron Co., 181 Minn. 588, 233 N. W. 405 (1930), was an action to recover for injuries resulting from continuous saturation with ice cold water while at work in defendant's mine. Since there was no accidental injury and since the injury was not an occupational disease enumerated in the Act, the suit was at common law and the common law defenses were available to the defendant. Judgment was for the defendant on the ground that the plaintiff had assumed the risk which was so apparent that the ignorance and inexperience of the plaintiff were no excuse.

Cedergren v. Minnesota Steel Co., 188 Minn. 331, 247 N. W. 237 (1933), was an action at law for death caused by a disease which was the cumulative effect of repeated inhalation of gas and fumes in the course of approximately two years' employment by the defendant as a stoker repairman. The case was not one within the Workmen's Compensation Act. It was similar to *Donnelly v. Minneapolis Mfg. Co.*, *supra*. The court held for the defendant on the ground that the deceased was chargeable with contributory negligence as a matter of law,

since adequate means of ventilation were available and because the deceased knew of the danger and how it could be prevented but notwithstanding kept on working. Moreover, the rules of employment bound him to report any defective appliance and this he failed to do.

In *Clark v. Banner Grain Co.*, 261 N. W. 596 (Sup. Ct. June, 1935), an action was brought at law for damages to plaintiff's health based upon defendant's failure to provide adequate ventilation to remove poisonous fumes from its wheat bins. A certain bin had become overheated and caked, and defendant had placed an excessive amount of chloride in the wheat, which generated injurious fumes. Plaintiff became completely disabled after working for five days in the bin. There was a verdict for the plaintiff, and the defendant's motion for judgment notwithstanding the verdict on a new trial was denied. One of defendant's contentions was that the plaintiff's right of action was one under the Workmen's Compensation Act exclusively, since the plaintiff's action was based upon an accidental injury, but the court held that such was a question of fact properly left to the jury. The court also held that there was nothing in the record to justify it in holding the defendant to have assumed the risk or to have been contributorily negligent, and also that the defendant company was within the contemplation of the ventilating provision of Sec. 4174 of the code.

In *Anderson v. Russell Miller Milling Co.*, 265 N. W. 305 (Sup. Ct., Feb., 1936), compensation was denied where an employee's death was caused by the inhalation of a deadly gas used to fumigate defendant's mills overnight. The gas previously used on numerous occasions had been harmless. Warning signs were posted everywhere and the men were instructed not to report for work until eight a. m. The deceased, however, came early, dodged the door man who shouted a warning, and proceeded to the dressing room to get into his working clothes. Death occurred within a few minutes. The court did not hold that such was not an accidental injury but that because of the wilful disobedience to his employer's instructions, he was not in the course of his employment at the time of the death.

B. Notice of disability and procedure before the Commission.

Both of the cases next following were hearings on appeal from orders made by the Industrial Commission.

In *Clausen v. Minnesota Steel Co.*, 188 Minn. 80, 242 N. W. 397 (1932), the plaintiff employee sustained an accidental injury to his hand in the latter part of November, 1929, which arose out

of and in the course of his employment, but the injurious effect of the accident remained latent and dormant and did not develop or manifest itself or disable the plaintiff until March 10, 1930. Notice of the accident or injury was given defendant on March 11, 1930. The defendant contended that the plaintiff's claim was barred by Section 4280 of the Workmen's Compensation Act, which provides that:

"* * * Unless knowledge be obtained or notice given, within ninety (90) days after the occurrence of the injury, no compensation shall be allowed."
(Bold face type ours.)

The court however refused to follow the defendant's contention. "Accident" and "occurrence of an injury" did not, in the court's opinion, have the same meaning; and since the Act contemplates that it is the disability or loss of earning power resulting from an injury that is compensable and not merely the injury, no matter how painful, when the Act spoke of "the occurrence of the injury," it referred to compensable injuries which occur only when disability appears. The court concluded that the time for the giving of notice did not begin to run until disability occurred or until it became reasonably apparent that disability was likely to occur.

Pease v. Minnesota Steel Co., 265 N. W. 427 (Sup. Ct. March, 1936), expressly cited the above case and followed that decision under a similar set of facts.

II. Other Statutes.

1. Foundries: Statutes Sections 4054-4083.

The following sections are cited as of interest in this study; Sec. 4054 defines "iron or steel foundry."

Sec. 4059. "Mechanical ventilation. Where smoke, steam, gases or dust arising from any of the operations of the foundry are dangerous to the health or eyes, and where a natural circulation of air does not carry off the greater part of such smoke, steam, gases or dust, there shall be installed and operated adequate mechanical means of ventilation."

Sec. 4060. "Molding rooms. The cleaning and chipping of castings shall be done in cleaning rooms, except that casting may, when necessary, be chipped or cleaned in the molding room or where cast, provided sufficient protection is furnished by the use of a curtain or screen, or some other means equally good, to protect employees therein."

"This section shall not apply if mechanical appliances are used for cleaning castings and the dust

and particles arising therefrom are effectively removed."

Sec. 4061. "Exhaust systems in tumbler mills. Where tumbler mills are used, exhaust systems shall be installed to effectively carry off the dust arising from the cleaning of castings, except where the mill is operated outside the foundry. This section shall not prohibit the use of a water barrel for cleaning castings. Sand blast operations shall be carried on in the open air or in a separate room used solely for that purpose. The milling of cupola cinders, when done inside the foundry, shall be carried on by an exhaust mill or water mill."

Sec. 4062. "When compressed air cannot be used. No cores shall be blown out of castings by compressed air unless such work is done outside of the foundry or in a special or dust-proof enclosure. Employees engaged in cleaning castings by compressed air or sand blast shall wear eye guards and helmets, to be furnished by the employer."

Sec. 4063. "Floods and pipes to be supplied. When fumes, gases and smoke are emitted from drying ovens in such quantities as to be detrimental to the health or eyes of the employees, hoods and pipes or other adequate means of ventilation shall be provided."

Sec. 4064. "Artificial light. Where natural light is insufficient to properly light the foundry, artificial light of sufficient power shall be provided."

"The continuous use of hand torches or other lamps that emit injurious smoke and gases is prohibited."

Sec. 4065. "Heat. Proper and sufficient heat shall be provided and maintained in every foundry. The use of the open salamander stove, or stoves of that type, for heating purposes shall be prohibited, except in cases of emergency."

Sec. 4076. "Application to brass foundries. The provisions of this act relative to dust, smoke, gases or fumes, ventilation, sanitation, heat, light, gangways and aisles, safety appliances, drying and locker accommodations, as specified for iron and steel foundries, shall apply to brass foundries."

Sec. 4079. "Gangways, etc. In all brass foundries gangway dirt and floor scrapings shall not be riddled in the room where workmen are employed, unless they are so dampened as to prevent dust arising therefrom."

Sec. 4083 provides penalties for violations of any of the provisions of these sections both as to employers and employees.

2. Hours of, and Restrictions on, Labor.

Sec. 4094 prohibits the employment of children under fourteen

years of age in any factory, mill or workshop, any mine, the construction of a building, or any engineering work, etc. It also makes it unlawful to employ such a child in any business or service whatever while the public schools are in session.

Sec. 4103, among other things, prohibits the employment of any child under sixteen years of age in certain occupations, among which are: operating circular or band saws, wood-shapers, wood jointers, planers, sandpaper or wood-polishing machinery, emery or polishing wheels, preparing or assisting in preparing any composition in which dangerous or poisonous acids are used, or in any other employment or occupation dangerous to the life, limb, health, or morals of such child.

3. Dangerous Machinery: Statutes Sections 4142-4202.

Sec. 4142. "§ * § Whenever, in the opinion of the labor commissioner, it becomes necessary, exhaust fans of sufficient power or other devices shall be provided for carrying off dust from emery wheels, grindstones and other dust-creating machinery."

Sec. 4149 prohibits the employment of children in certain occupations. It is similar to Sec. 4103.

Sec. 4172. "§ * § All waste, refuse, sweepings and decomposed matter shall be removed from such buildings" (places of employment) "daily, and in such manner as not to cause a nuisance. All cleaning shall be done, as far as possible, out of working hours; but, if done during working hours, shall be done in such a manner as to avoid unnecessary raising of dust or noxious odors."

Sec. 4174. "Ventilation. In every place of employment the employer shall provide, in each work-room thereof, proper and sufficient means of ventilation, and shall maintain proper and sufficient ventilation. If excessive smoke, steam, gas, fumes, vapors, dust or other impurities are created or generated by the manufacturing process or handicraft carried on therein, in sufficient quantities to obstruct the vision, or to be irritating, obnoxious or injurious to the health and safety of the employees therein, the room shall be ventilated in such manner as to remove them or render them harmless, so far as is practicable. If in the opinion of the commissioner of labor it is deemed necessary, he may order the installation of exhaust fans and other mechanical means of a proper construction to effectively remove from the point of origin such smoke, steam, gases, fumes, vapors, dust or other impurities. If the removal of such smoke, steam, gases, fumes, vapors, dust or other impurities is, because of the nature of the process, impracticable, the commissioner of labor may, if he deems it necessary to

the health of the workers in any place of employment, order the isolation of such process or handicraft in a separate room or building."

Sec. 4175 provides the minimum air space per employee except when temporary reduction is granted by the commissioner of labor. No permission is to be granted for a room in which smoke, gas, fumes, dust or vapors are generated or in which there are fires consuming oxygen.

Sec. 4189 places upon the commissioner of labor the duty of enforcing the provisions of the Act and also provides penalties for any breach of such provisions.

4. Inspector of Mines: Statute Sections 4233-4245.

Sec. 4235 provides that the inspectors of mines shall visit all mines at least once in every ninety days and condemn all such places where it is found that the employees are in danger from any cause, whether resulting from careless mining or defective machinery or appliances of any nature. If a dangerous condition exists, it is his duty to immediately order a cessation of work and give notice to the owner defining the limits of the dangerous place, the work to be done, or change to be made to render the same secure.

Sec. 4244 fixes the penalty for a breach of this Act.

III. Common Law Liability.

As declared by the court in *Donnelly v. Minneapolis Mfg. Co.*, supra, (161 Minn. 240, 201 N. W. 305), *Suess v. Arrowhead Steel Products Co.*, supra (180 Minn. 21, 230 N. W. 125), *Jurovich v. Interstate Iron Co.*, supra (181 Minn. 588, 233 N. W. 465), *Cedergrten v. Minnesota Steel Co.*, supra (188 Minn. 331, 247 N. W. 237), and *Clark v. Banner Grain Co.*, supra (261 N. W. 596), an action lies at law for accidental injury, including occupational disease, if the action is not barred because the parties are operating under Part 2 of the Workmen's Compensation Act. or if the disease is one not covered by the Act. Such actions must, of course, be based upon the negligence of the employer.

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations.

By Sec. 9191 of the Minnesota statutes, an action for personal injuries must be brought within six years after the cause of action accrues. Where death intervenes, Sec. 9657 provides that the representative must commence his action within two years after the wrongful act or omission which caused the death, and his recovery is limited to \$10,000 damages.

2. Surveys and Pending Legislation.

In 1934 the Division of Accident Prevention made a survey of silicosis, carbon monoxide gas, and lead poisoning in industry. The complete report was never published and is therefore not available. The need for regulation in regard to carbon monoxide gas was regarded as demanding prompt action. On the other hand, the hazard as regards silicosis was not found to be sufficiently pressing to warrant a continued survey in that field.

The Department of Labor and Industry is taking definite steps to decrease the hazards of carbon monoxide gas. Comprehensive rules and regulations have been adopted to assure adequate ventilation where the hazard is present, and an active campaign is in progress to educate employers and employees as to the danger.

Although efforts have been made to bring injuries and death resulting from the inhalation of dusts within the section of the Workmen's Compensation Act which enumerates the occupational diseases compensable thereunder, such has not been accomplished. Such a bill was presented at the last session of the legislature but it did not get out of committee.

CHAPTER XXVI MISSISSIPPI

I. Workmen's Compensation Act.

There is no Workmen's Compensation Act in this state. It is one of two states having no such law, the other being Arkansas.

II. Other Statutes—Hemingway's Annotated Mississippi Code, 1927.

1. Courts—Chapter 9.

Sec. 515:

"Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission, or by such unsafe machinery, way or appurtenance as would, if death had not ensued, have entitled the party injured, or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband, or father, or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representative of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall, in no case affect the right of recovery. * * *

"This section shall apply to all personal injuries of servants and employees received in the service of business of the master or employer, where such injuries result in death."

Sec. 516:

"In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the injury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

Sec. 518:

"In all actions for personal injuries to an employee, and in all actions where such injury results in death, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or

in part from the negligence of the master; except as to conductors, or locomotive engineers, in charge of dangerous or unsafe cars or engines voluntarily operated by them."

2. **Employer and Employee—Chapter 112.**
Sec. 5137:

"No boy or girl under the age of 14 years shall be employed or permitted to work in any mill, cannery, workshop, factory or manufacturing establishment within this state."

Sec. 5138 limits the hours of employment of children between the ages of 14 and 16 in the above enumerated establishments to 8 hours a day and 44 hours a week.

Sec. 5139 makes it unlawful to employ in any of the above establishments any child under the age of 14 years, or any child over the age of 14 years and under the age of 16 years, unless such child has complied with, or is complying with, the compulsory school attendance law.

3. **Safety and Sanitary Rules and Regulations of the State Board of Health.**

"All dangerous or hazardous machinery and mechanical contrivances shall be properly safeguarded so as to prevent injury to employees in such departments."

"Sufficient ventilation shall be provided and maintained in all factories and workshops. Where excessive heat, steam, gases, vapors, dust or other impurities injurious to health are generated, the rooms shall be provided with ventilation and humidity to render them harmless as far as is practicable."

III. **Common Law Liability.**

As the result of two very recent decisions of the Supreme Court of Mississippi, it is evident that under the common law of this state a right of action exists in favor of an employee against his employer for injury or death resulting from the inhalation of dust polluted air in the course of employment, proximately caused by the negligence of the employer.

The first of the cases was *Benjamin v. Davidson-Gulfport Fertilizer Co.*, 169 Miss. 162, 152 So. 839 (1934). The action was one at common law to recover for an employee's death from bronchial pneumonia caused by working for half a day in thick clouds of phosphate rock dust while unloading a box car filled with such dust and conveying it to a mixing pit of the defendant

some fifty feet away. The deceased had worked from 9 o'clock in the morning until 2:30 o'clock in the afternoon when his nose began to bleed and he began to cough up blood from the effects of the dust. He was taken home and shortly thereafter died. A man experienced in construction work testified that in order to protect workmen in confined dust, it was necessary and customary for employers to furnish respirators, which were quite inexpensive. The lower court directed a verdict for the defendant on the ground that the deceased was an independent contractor. The Supreme Court reversed this decision and remanded the case, and added that the evidence was sufficient to go to the jury on the question whether the defendant knew, or by reasonable care should have known, that the inhaling of the dust was injurious, and whether defendant, in the exercise of reasonable care, should have known that the furnishing of a respirator or other protection would have prevented the injury. The Court thereby recognized plaintiff's right to recover for the death resulting from the inhalation of dust, if the negligent acts of the employer were proven to be the cause.

In *Allen Gravel Co. v. Cuttla*, 161 So. 670 (Sup. Ct., May, 1935), the Court definitely established that such a common law right of action does exist in Mississippi. The plaintiff in that case brought his action at law for disability resulting from tuberculosis brought on by silicosis caused by the inhalation of silica dust during seven months' employment by the defendant on a rock crushing machine. The plaintiff had been employed by the defendant before the rock crushing machine was installed and continued in defendant's employ after work on that machine had ceased.

In the lower court the jury awarded the plaintiff \$7,000 and the defendant appealed the decision on the grounds that there was insufficient testimony to sustain the verdict and furthermore that the plaintiff and defendant had equal opportunities to know and judge the effect of the dust upon the lungs.

Evidence was introduced to show that a respirator would have prevented the breathing of dust and could have been purchased at a nominal cost; that other appliances were available which would materially reduce the hazard; and that employees engaged in similar work at other points were protected.

The Supreme Court of the state affirmed the judgment in plaintiff's favor on the ground that, since an obligation rests upon an employer to acquaint his employee with the dangers which can be ascertained by a knowledge of scientific principles governing substances and processes used in the em-

ployment, and to which, in his ignorance, the employee will otherwise be subject, the defendant was under the duty to make reasonable inquiry as to the dangers incident to the operation of the machinery, and such a reasonable inquiry would have disclosed to the defendant the dangers to which the plaintiff was exposed. The Court pointed out that the danger is one of general recognition and easily ascertainable; that when simple devices can be obtained at a reasonable cost, the employer should procure them for his employees; and that, although he need not use all of the latest devices possible, he should use reasonable care to make the place of employment safe. The Court concluded that there was sufficient evidence to warrant the jury's finding of negligence on the part of the defendant and their returning of a verdict for the plaintiff.

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations.

By Section 2635, actions for personal injuries must be brought within six years after the cause of action has accrued. Where death intervenes, the person entitled to bring the action must commence the action within one year after the death (Sec. 2651).

2. No official survey of dust hazards has been made, and there are at present no bills pending in the legislature relating to dust hazards or to the right of recovery for injury caused by diseases resulting from the exposure thereto.

CHAPTER XXVII MISSOURI

1. Workmen's Compensation Act.

1. Statutes. Revised Statutes of Missouri 1929, Secs. 3299-3376.

2. Administration. The Act is administered by the Workmen's Compensation Commission composed of three persons appointed by the Governor, by and with the advice and consent of the Senate, for terms of six years each. Communications may be addressed to the Commission at Jefferson City, Missouri.

3. Scope of the Act. Sec. 3301 provides, in part:

"If both employer and employee have elected to accept the provisions of this chapter, the employer shall be liable irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, * * *." (Bold face type ours.)

Sec. 3305 (b) provides:

"The word 'accident' as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury. The term 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The said term shall in no case except as hereinafter provided be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the workman is at work. 'Death' when mentioned as a basis for the right to compensation means only death resulting from such violence and its resultant effects occurring within three hundred weeks after the accident: Provided, that nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases, (unless the employer shall file with the Commission a written notice that he elects to bring himself with

respect to occupational disease within the provisions of this act and by keeping posted in a conspicuous place on his premises a notice thereof to be furnished by the Commission, and any employee entering the services of such employer and any employee remaining in such service thirty days after the posting of such notice shall be conclusively presumed to have elected to accept this section unless he shall have filed with the Commission and his employer a written notice that he elects to reject this act.)" (Bold face type ours.)

That part of the section enclosed in brackets was added by an amendment effective September 13, 1931.

The Act is elective both as to employers and employees (Sec. 3300). Employers are divided into two classes, viz. major employers, those regularly employing more than 10 employees; and minor employers, those employing 10 or less. Upon complaint, the Commission may find a minor employer to be engaged in an occupation hazardous to the employee. Major employers and their employees are presumed to have elected the provisions of the Act, unless notice is given, in the prescribed manner, of election to reject. Minor employers, who are found to be engaged in hazardous occupations, are presumed to have accepted the Act unless they reject it within ten days after such finding. (Secs. 3300 and 3302). Minor employers, though not engaged in hazardous occupations may, by specific election, become subject to the Act. (Sec. 3303).

any minor employer, determined to be engaged in a hazardous occupation, or any major employer has rejected the Act, he loses the defenses of assumed risk, negligence of fellow servant, and contributory negligence in any action to recover for personal injury or death of an employee in the course of employment. The defenses are allowed where the employer has accepted the Act and the employee has rejected it. (Sec. 3302(4)).

Compensation will be denied where the employee's injury or death is intentionally self-inflicted. Where the injury is caused by the employer's failure to comply with a statute or a lawful order of the Commission the award will be increased 15%, and where it is caused by the employee's willful failure to use a safety device or his failure to obey reasonable safety rules adopted by the employer, the award will be decreased 15%. provided that the employee had knowledge of the rule and the employer had diligently sought obedience thereto. (Sec. 3301). Where a minor is injured while employed in known violation of the Child Labor Law, 50% additional compensation will be awarded. (Sec. 3320 (j)).

The maximum amount payable under the Act for temporary total disability is \$8000, for temporary partial disability \$2000, for permanent partial disability \$8000, for permanent total disability \$20 weekly during life, and for death \$150 for burial, \$250 for reasonable expense of the last sickness if such is not covered by the provisions of Sec. 3311, plus \$6000. (Secs. 3313-3320). By Sec. 3311, in addition to all other compensation, the employer must provide a maximum of \$750 for reasonable medical care for the first ninety days and thereafter such additional similar treatment as the Commission determines to be necessary.

An employer must insure his liability under the Act with some authorized insurance carrier, unless he elects to carry the whole or part of the liability himself, which he may do upon his satisfying the Commission of his ability. (Sec. 3323). Where an employer carries his own risk, he must pay a tax at the same rate and on the same basis as taxes are assessed against insurance carriers to provide for the expense of administering the Act. (Sec. 3369).

Notice of an injury must be given within 30 days after the accident and a claim filed within 6 months after the injury or death. (Secs. 3336 and 3337). The Act was not amended, except in minor particulars, when the elective occupational disease provision was added to Section 3305 (b), as hereinbefore indicated. There are no provisions as to notice and filing of claims except the foregoing.

4. Court Construction.

In the absence of the joint election of employer and employee to come within the terms of the Act as to occupational diseases, there can be a recovery thereunder for an injury or death resulting from disease only when such results from an "accident" as defined in the Act.

Miller v. St. Joseph Transfer Co., 224 Mo. App. 1114, 32 S. W. (2d) 449 (1930), involved a claim under the Workmen's Compensation Act for an injury in the form of a palmar abscess which resulted from unloading and stacking furnaces over a two weeks period of time. The Court upheld the finding of the Commission that the plaintiff was suffering from an occupational disease and not an accident, because under the evidence as presented, the Commission had a right to find that the injury was caused by constant pressure and consequent irritation rather than by any particular sudden impact of the hand with a furnace or grate. The plaintiff's claim was accordingly denied.

Rue v. Eagle Picher Co., 225 Mo. App. 408, 38 S. W. (2d)

487 (1931), also involved a claim for compensation under the Act. The disability of the plaintiff resulted from the inhalation of an excessive amount of lead dust when he had worked for only about 3½ hours with a defective mask. The Court held the injury to be the result of an accident and awarded compensation to the plaintiff.

Lovell v. Williams Bros., 50 S. W. (2d) 710 (St. Louis Court of Appeals, 1932) involved a claim similar to that in *Miller v. St. Joseph Transfer Co.*, supra. The plaintiff bruised his hand by pressing down on a spade in trimming the side of a ditch which was being dug through hard ground and roots. He had been working at such digging for only a few days when his hand became sore and swollen. The Court reversed the finding of the Commission and awarded compensation to the plaintiff stating that the terms of the Act should not be given a narrow and restricted meaning, but should be liberally construed in favor of employees. In this case the injury did not result from any single blow but was the cumulative effect of three or four days of "continued violence."

In *Riehart v. F. M. Stamper Co.*, 227 Mo. App. 653, 55 S. W. (2d) 729 (1932), the plaintiff brought his action at common law for disability resulting from being ordered, against his objection, to work on a certain day in a refrigerator room. It was a warm day and he had been perspiring freely and, as a result of the change of temperature, he contracted pneumonia. The Court dismissed the plaintiff's action on the ground that his proper remedy was under the Workmen's Compensation Act and not at common law.

For cases involving actions at law for injuries caused by the inhalation of dust in the course of employment, see Section III of this Chapter.

II. Other Statutes.

1. Labor, Employment, etc., Chapter 95. Article 6. General Provisions for Health and Safety of Employees.

"Sec. 13228. Every factory and workshop in this state where women and children are employed, and where dusty work is carried on, shall be lime-washed or painted at least once in every twelve months."

"Sec. 13232. All manufacturing, mechanical, mercantile and other establishments in this state shall be so ventilated as to render harmless all impurities, as near as may be."

"Sec. 13234. Every person, firm or corporation using any polishing wheel or machine of any char-

acter which generates dust, smoke or poisonous gases in its operation, shall provide each and every such wheel or machine with a hood, which shall be connected with a blower or suction fan of sufficient power to carry off said dust, smoke and gases and prevent its inhalation by those employed about said wheel or machine; * * *"

"Sec. 13235. In all establishments in this state wherein labor is employed, where any process is carried on by which dust or smoke is generated, the industrial inspector and his assistants and deputies shall have the power and the authority to order that a fan or some other contrivance be put in to prevent the inhalation of such dust or smoke by employees."

Sec. 13237 provides that when a state industrial inspector or an assistant finds that the ventilation of any establishment where labor is employed is such as to be dangerous to the health and safety of employees, he shall immediately order the employer to make the necessary alterations within ten days; if not done the employer becomes subject to penalties and to a sealing of the defective appliance until the order has been complied with.

"Sec. 13249. * * * Every corporation, company, or person engaged in operating any such foundry shall provide and maintain adequate and efficient devices for carrying off all poisons or injurious fumes, gases and dust from such foundry."

"Such" in this Section refers to foundries in which four or more men are employed.

"Sec. 13252. That every employer of labor in this state engaged in carrying on any work, trade or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employee to the danger of illness or disease incident to such work, trade or process, to which employees are exposed, shall for the protection of all employees engaged in such work, trade or process, adopt and provide approved and effective devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work, trade or process."

"Sec. 13253. The carrying on of any process or manufacture, or labor in this state in which antimony, arsenic, brass, copper, lead, mercury, phosphorus, zinc, their alloys or salts or any poisonous chemicals, minerals, acids, fumes, vapors, gases, or other substances, are generated or used, employed or handled by the employees in harmful quantities, or under harmful conditions, or come in contact with in a harmful way, they are hereby declared to be

especially dangerous to the health of the employees."

"Sec. 13254. *** in all processes of manufacture or labor referred to in this section, which are productive of noxious or poisonous dusts, adequate and approved respirators shall be furnished and maintained by the employer in good condition and without cost to the employees, and such employees shall use such respirators at all times while engaged in any work productive of noxious or poisonous dusts."

"Sec. 13255. Every employer engaged in carrying on any process or manufacture referred to in section 13253 shall, as often as once every calendar month, cause all employees who come into direct contact with the poisonous agencies or injurious processes referred to in section 13253, to be examined by a competent licensed and reputable physician for the purpose of ascertaining if there exists in any employee any industrial or occupational disease or illness or any disease or illness due or incident to the character of the work in which the employee is engaged."

Sec. 13256 places upon such examining physician the duty of making a report to the state board of health. A failure to report constitutes a misdemeanor punishable by fine.

"Sec. 13260. All employers engaged in carrying on any process or manufacture or labor referred to in section 13253, shall provide and maintain adequate devices for carrying off all poisonous or injurious fumes from any furnaces which may be employed in any such process or manufacture or labor, and shall also provide and maintain adequate and efficient facilities for carrying off all injurious dust, and the floors in any room or apartment where such work or process is carried on shall be kept and maintained in a smooth and hard condition, and no sweeping shall be permitted during working hours except where the floor in such workshop is dampened so as to prevent the raising of dust; and all ore, slag, dross and fume shall be kept in some room or apartment separate from the work rooms occupied by the employees, and all mixing and weighing of such ore, slag, dross, or fume shall be done in such separate room or apartment, and all such material shall be dampened or covered before being handled or transported by employees."

"Sec. 13261. When any flues or other apparatus are used in any such process or manufacture or labor referred to in section 13253, and when such flues or other apparatus are being cleaned or emptied, the employer shall in every case provide and maintain a sufficient, adequate and efficient means or device, such as canvas bags or other approved device, or by dampening the dust, or some other efficient method for catching and collecting the dust and pre-

venting it from unreasonably fouling or polluting the air in which the employees are obliged to work, and, wherever practicable, the dust occasioned in any process or manufacture referred to in section 13253, and in any polishing or finishing therein, shall be dampened or wet down or covered, and every reasonable precaution shall be adopted by the employer to prevent the unnecessary creation or raising of dust, and all floors shall be washed or scrubbed at least once every working day; and such parts of the work or process as are especially dangerous to the employees, on account of poisonous fumes, dusts and gases, shall, where practicable, be carried on in separate rooms and under cover of some suitable and efficient device to remove the danger to the health of such employees as far as may be reasonably consistent with the manufacturing process, and the fixtures and tools employed in any such process or manufacture or labor shall be thoroughly washed and cleaned at reasonable intervals.

"Sec. 13262. All hoppers or chutes or similar devices used in the course of any process or manufacture referred to in section 13253 shall be provided with a hood or covering, and an adequate and efficient apparatus or other proper device for the purpose of drawing away from the employees, noxious, poisonous or injurious dusts, and preventing the employees from coming into unnecessary contact therewith; and all conveyances or receptacles used for the transportation about or the storage in any place where any such process or manufacture or labor referred to in section 13253 is carried on, shall be properly covered or dampened in such a way as to protect the health of the employees, and no refuse of a dangerous character incident to the work or process carried on in any such place shall be allowed to remain accumulated on the floors thereof."

"Sec. 13264. For the purpose of disseminating a general knowledge of the provisions of this article and of the dangers to the health of employees in any work or process covered by the provisions of this article, the employer shall post in a conspicuous place in every room or apartment in which any such work or process is carried on, appropriate notices of the known dangers to the health of any such employees arising from such work or process, and simple instructions as to any known means of avoiding, so far as possible, the injurious consequences thereof, and the state industrial inspector shall have prepared a notice covering the salient features of this article, and furnished a reasonable number of copies thereof to employers in this state affected by the provisions of this article, which notice shall be posted by every such employer in a conspicuous place in every room or apartment in such place of employment. The notices required by this section

shall be printed on cardboard of suitable character and the type used shall be such as to make them easily legible."

"Sec. 13284. Every factory in which three or more persons are employed, and every workshop in which children, young persons or women, three or more in number, are employed, shall be so ventilated while work is carried on therein that the air shall not become so exhausted as to be injurious to the health of the persons employed therein, and shall also be so ventilated as to render harmless, so far as is practicable, all the gases, vapors, dust or other impurities generated in the course of the manufacturing process or handicraft carried on therein that may be injurious to health."

"Sec. 13285. If, in a factory or workshop included in section 13284 of this article, any process is carried on by which dust is generated and inhaled to an injurious extent by the persons employed therein, and it appears to the industrial inspector, or his assistant, or deputy, that such inhalation could be to a great extent prevented by the use of a fan or other mechanical means, and that the same could be provided without excessive expense, such inspector may direct a fan, or other mechanical means of a proper construction, to be provided within a reasonable time; and such fan or other mechanical means shall be so provided, maintained and used."

Sec. 13286 provides the penalty for breach of the article.

2. Mines and Mining, Chapter 107.

Sec. 13630 provides the amount of air to be supplied to workers in coal mines and the method of circulating such air.

Sec. 13631 requires that the volume of air be split into separate currents and limits the number of men to be supplied by the same current.

"Sec. 13660. The state mine inspector for lead mines, zinc mines and mines other than coal is empowered to inspect such mines to ascertain their condition with respect to the health of the employees. If the ventilation is insufficient, it is his duty to notify the owner to correct the condition in such a way as will in the inspector's discretion remedy the situation. He is empowered to require a cessation in all operations until such defect has been remedied."

"Sec. 13662. The state mine inspector for lead mines, zinc mines and other mines, other than coal, is authorized to inspect the mines to ascertain the presence of dust in such quantities as to be injurious to the employee's health. Upon notification the owner shall within 15 days provide an independent water line leading to the place where such dust is

produced so that such can be sprinkled, and thereafter the employees shall keep such wet or moist to prevent as far as possible any dust raising."

Sec. 13671 gives a right of action for personal injury or death occasioned by a failure to comply with the provisions of the Act. Such action must be commenced within one year after the cause of action has accrued and the amount recoverable for a loss of life is limited to \$10,000.

3. Children—Chapter 125.

"Sec. 14084. It shall be unlawful for any child in this state under the age of 14 years to be employed, permitted or suffered to work at any gainful occupation except in, (a) the sale and distribution of newspapers, magazines and periodicals, (b) agricultural labor and domestic service, or any service performed for parent or guardian."

Sec. 14085 provides that it shall be unlawful to employ any child under 16 except as authorized by law.

Sec. 14087 provides, among other things, that no child under the age of 16 years shall be employed in any occupation dangerous to their life, health or limb, or injurious to their health or morals.

III. Common Law Liability.

Where there has been no election by employer and employee to come within the Act as to occupational diseases, actions at common law for disability or death resulting therefrom are unaffected by its terms. Sec. 3305 (b) expressly declares that

"nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases.
* * *

The courts, on numerous occasions, have permitted a recovery at law for injuries or death resulting from the inhalation of noxious dusts in the course of employment. In *Boll v. Condie-Bray Glass & Paint Co.*, 321 Mo. 92, 11 S. W. (2d) 48 (1928), the plaintiff brought his action at law to recover for injuries sustained as the result of inhaling lead dust in the process of carrying bags of dry lead from one part of defendant's plant to another. He alleged a failure to provide a safe place to work by not providing proper ventilators, knowledge on the defendant's part of the dust and the resulting danger to the plaintiff, violation by the defendant of Secs. 13252, 13254, 13260 and 13262 of the general statutes, his own ignorance of the

danger, and defendant's failure to warn him of the danger. The defendant, in answer to the petition, alleged the unconstitutionality of the statutes relied upon by the plaintiff.

At the close of the plaintiff's evidence, the lower court sustained defendant's demurrer to the evidence. The Supreme Court reversed that decision and remanded the case holding that the sections of the statutes under consideration were constitutional and that the evidence introduced by the plaintiff, to show defendant's violations thereof, made out a prima facie case which entitled the plaintiff to have his case go to the jury. It also declared that it was not incumbent upon the plaintiff to prove that such devices as were required by statute were practical, feasible, possible, or could be had at a reasonable expense.

In *Wagner Electric Corp. v. Snowden*, 38 F. (2d) 599 (C. C. A.—8th—1930) a judgment at law for the plaintiff was affirmed where the disability resulted from three weeks' exposure to fumes from a sulphuric acid mixture. The case was submitted to the jury upon the common law theory of a failure to furnish a reasonably safe place in which to work and a failure to observe Secs. 13252 and 13253 of the Missouri statutes. The Court stated that there was no evidence warranting a submission of the question of assumption of risk to the jury since no evidence was offered to show that the plaintiff appreciated the danger of continuing his employment in the dangerous area, which is something more than mere knowledge of the defect by which the danger is threatened. The Court also affirmed that part of the opinion in *Bell v. Condie-Bray Glass & Paint Co.*, supra, which held that a violation of the statutes dealing with safety of employees constituted negligence per se.

In *Cropper v. Titanium Pigment Co.*, 47 F. (2d) 1038 (C. C. A.—8th—1931), a judgment for the defendant was reversed and a new trial granted where plaintiff's action was to recover damages for injuries sustained as a result of inhaling injurious fumes from acid in reduction plants over a period of several months. Plaintiff's action was based upon defendant's failure to use due care to prevent the impairment of plaintiff's health, defendant's failure to warn plaintiff of the danger of which defendant knew or should have known, and the violation of Secs. 13254, 13255 and 13264 of the Missouri statutes. The Court found error in the lower courts striking from the petition those counts which charged a violation of Secs. 13255 and 13264, and in its sustaining objections to certain testimony offered by the plaintiff. The Court also upheld the constitutionality of the statutes involved.

In *Dodd v. Independence Store & Furnace Co.*, 330 Mo. 662, 51 S. W. (2d) 114 (1932), the plaintiff brought his action at law for disability resulting from tuberculosis, caused by the inhalation of fine sand during a year's employment as a sand blaster. Plaintiff's action was based upon the defendant's alleged failure to furnish an adequate respirator as required by Sec. 13254 of the Missouri statutes. Defendant pleaded a general denial, that the plaintiff had assumed the risks of the employment, and was guilty of contributory negligence. The Court affirmed a judgment for \$10,000 in favor of the plaintiff. The Court stated that a servant does not assume a risk arising from the defendant's violation of a statute, and that the phrase, "noxious dusts," as used in the statute included all dusts which may be harmful by reason of the amount thereof or the manner of handling the same, and is not limited to dusts which are inherently harmful by reason of the component elements therein.

The Court, in *Langenecker v. St. Louis Sulphur & Chemical Co.*, 65 S. W. (2d) 648 (St. Louis Court of Appeals, 1933), affirmed a judgment at law in favor of the plaintiff for \$7,500, where the disability for which damages were sought resulted from the inhalation of sulphur dust in the course of 9 months employment in the defendant's plant. The plaintiff alleged a failure to provide a reasonably safe place to work, to warn plaintiff of the danger, and to provide fans and respirators; the plaintiff further alleged violations of Secs. 13252, 13253, 13254, 13260, 13264 and 13265 of the Missouri statutes.

In *Plank v. R. J. Brown Petroleum Co.*, 332 Mo. 1150, 61 S. W. (2d) 328 (1933), the plaintiff brought his action at law for disability resulting from the inhalation of gasoline fumes while employed for 6 or 7 months by the defendant as a spray painter. He alleged that the defendant had been negligent in failing to observe Secs. 13252 and 13264 of the Missouri statutes. The jury in the lower court rendered a verdict in plaintiff's favor for \$17,500 and the defendant appealed. The decision was reversed and remanded because the jury had been allowed to consider permanent injury in determining the amount of the award when in fact such had not been shown with reasonable certainty so as to warrant its being considered by the jury.

In *St. Joseph Lead Co. v. Jones*, 70 F. (2d) 475 (C. C. A.—8th—1934), the plaintiff brought an action at law based upon defendant's failure to furnish a safe place to work and to observe Secs. 13252-13266 of the Missouri statutes. The disability for which damages were sought resulted from the inhalation of lime dust during plaintiff's employment by the defendant for one month in placing lime and other substances in tanks to soften

the water to be used in defendant's boilers. The defendant, upon his appeal to the overruling of his demurrer to the petition, contended that the statutes were unconstitutional. The Court affirmed the decision in favor of the plaintiff holding first, that without regard to the statutes the plaintiff had stated a good cause of action at common law, and secondly, that the statutes under consideration were constitutional.

In *Ford Motor Co. v. Brady*, 73 F. (2d) 248 (C. C. A.—8th—1934), the plaintiff was employed by defendant from March, 1930 until July, 1931 in a spraying room where he inhaled poisonous dusts from the paints used. As a result of his work the plaintiff's health became impaired and he contracted tuberculosis. The plaintiff then filed his action at law to recover damages for the resulting disability, alleging that the defendant had been negligent in failing to observe Secs. 13252-13266 of the Missouri statutes. There was a judgment in the lower court in favor of the plaintiff for \$5,000, and the defendant appealed that decision. The Court affirmed the judgment in favor of the plaintiff on the ground that the petition was good and that the evidence was sufficient to make a case for the jury.

In *Downey v. Kansas City Gas Co.*, 79 S. W. (2d) 1063 (Kansas City Court of Appeals, 1935), the action was at law to recover for the injury to a pipe fitter's eyes resulting from getting soot, ashes, etc., in his eyes while cutting and cleaning out openings in old chimneys and flues preparatory to installing defendant's hot water heaters on the premises of persons to whom such appliances had been sold. The plaintiff alleged negligence on the part of the defendant in failing to provide a reasonably safe place in which to work. The jury returned a verdict in plaintiff's favor for \$1,500, and the judgment on the verdict was affirmed.

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations.

Under Sec. 862, all actions for personal injuries must be brought within five years after the cause of action shall have accrued. Where death occurs, the representative must, under Sec. 870, commence his action within one year after the death.

2. New Legislation and Surveys.

As the result of an amendment effective September 13, 1931, occupational diseases, by the joint election of employer and employee, may be brought within the provisions of the Workmen's Compensation Act. No official survey of dust hazards and diseases resulting therefrom has been made, and no bills are now pending in the legislature dealing with precautionary measures to be taken in respect to dust hazards.

CHAPTER XXVIII MONTANA

I. Workmen's Compensation Act.

1. **Statutes.** Revised Code of Montana 1921, Secs. 2816-3033.
2. **Administration.** Sec. 2819.—The Act is administered by the Industrial Accident Board, which is composed of three members, one of whom is the commissioner of agriculture, labor and industry, another the state auditor, and the third an individual appointed by the Governor to serve for a four-year term, and who serves as Chairman of the Board. Communications may be addressed to the Board at Helena, Montana.
3. **Scope of the Act.** No reference is made in this Act to "occupational disease" and there is no specific provision for compensation for "disease" of any kind.

Sec. 2911 provides:

"Every employer * * * (who is bound by the act), shall be liable for the payment of compensation in the manner and to the extent hereinafter provided to an employee who has elected to come under this act, and who shall receive an injury arising out of and in the course of his employment, or, in the case of his death from such injury, to his beneficiaries, * * *." (Held face type ours.)

Sec. 2870 provides:

"'Injury' or 'injured' refers only to an injury resulting from some fortuitous event, as distinguished from the contraction of disease."

Sec. 2864 provides:

"'Injury' means and shall include death resulting from injury."

The courts have construed the Act as limited in application to "industrial accidents."

The Act provides for payment of compensation under three "plans" (Sec. 2816). Under "plan number one" (Sec. 2970-2977), the employer is permitted, upon proving financial ability, to pay compensation directly to his employees. Under "plan number two" (Secs. 2978-2989), the employer is permitted to insure his liability to pay compensation. Under "plan number three" (Secs. 2990-3011), the employer pays into a state fund, and from it compensation is paid to the employees.

Part I of the Act comprises Secs. 2816-2969, and is designated "General Provisions." Inasmuch as occupational disease is not covered, a detailed analysis will not be undertaken.

The Act applies to a long list of occupations, which are declared to be hazardous (Sec. 2847-2852). The list includes almost every common occupation, and it is then provided in Sec. 2852:

"If there be or arise any hazardous occupation or work other than hereinbefore enumerated, it shall come under this act and its terms, conditions, and provisions as fully and completely as if hereinbefore enumerated."

Employers are not covered by the Act unless they specifically so elect. If an employer does not so elect, he loses the common law defenses if sued to recover for injury or death of an employee. (Sec. 2836).

Sec. 2838 provides:

"Any employer who elects to pay compensation as provided in this act shall not be subject to the provisions of section 2836, nor shall such employer be subject to any other liability whatsoever for the death of or personal injury to any employee except as in this act provided; and except as specifically provided in this act, all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee are hereby abolished; provided, that section 2836 shall not apply to actions brought by an employee who has elected not to come under this act, or by his representatives, for damages for personal injuries or death, against an employer who has elected to come under this act."

4. Court Construction.

Cases arising under the Workmen's Compensation Act which involve disability resulting from the inhalation of noxious dusts, gases, and fumes in the course of employment, are infrequent and those reported do not indicate that recovery for such a disability is possible under the Act.

Attention has already been called to the fact that disability resulting from an injury is compensable under the Act only when the injury results from some fortuitous event, as distinguished from the contraction of a disease. It is interesting also to note that the word "accident" appears frequently in the Act, as for example, in cases involving injury or death, all claims must be presented within twelve months of the date of the accident (Sec. 2899); in claims for injuries not resulting in

death, notice must be given within thirty days after the occurrence of the accident (Sec. 2933); and in claims for death benefits, dependency is to be determined as of the date of the happening of the accident to the employee (Sec. 2905). The Act has consistently been construed by the courts to cover "industrial accidents" arising out of and in the course of employment.

In *Wirta v. North Butte Mining Co.*, 64 Mont. 279, 210 P. 332 (1922), the plaintiff brought his action at law for damages resulting from the inhalation of gas and fumes in defendant's mine when a fire was started while the plaintiff was at work, and which confined him for forty hours without possibility of escape. The court dismissed plaintiff's action because, since both plaintiff and defendant had elected to accept the Workmen's Compensation Act and since the injury was one compensable thereunder, the plaintiff's remedy under the Act was exclusive and precluded any right of recovery at law. The court stated, as one of the conditions necessary to create a liability under the Workmen's Compensation Act, that there must be an "industrial accident" causing the injuries complained of.

In *Nicholson v. Roundup Coal Mining Co.*, 79 Mont. 358, 257 P. 270 (1927), an award was sought under the Workmen's Compensation Act for the death of a miner, predisposed to heart trouble, which resulted from the shock of passing from the relatively high temperature of the defendant's mine to the below zero temperature outside through a passage which served as an air course. Compensation was awarded the claimant.

"Fortuitous" as used in the Act was defined to mean "happening by chance or accident; coming or occurring unexpectedly or without known cause; chance; accident" and therefore "synonymous with 'industrial accident'."

In *Murphy v. Industrial Accident Board*, 93 Mont. 1, 16 P. (2d) 705 (1932), compensation was awarded the plaintiff where exposure to noxious gas and fumes in defendant's mine on a specific day caused an infection to get into the plaintiff's blood stream, which resulted in his disablement. The court stated that "a workman is entitled to compensation when a previously existing latent condition or disease, not disabling, is lighted up, aggravated, or accelerated by some fortuitous event, in other words, by some occurrence aside from the usual course of events occurring in the course of his employment, which produces disability."

As regards the exclusiveness of the Act, Sec. 2838 provides that, where an employer elects to pay compensation, he shall not be "subject to any other liability whatsoever for the death

of or personal injury to any employee except as in this act provided; and, except as specifically provided in this act, all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee are hereby abolished; * * *." (Bold face type ours.)

Sec. 2839 provides:

"Where both the employer and employee have elected to come under this Act, the provisions of this Act shall be exclusive, and such election shall be held to be a surrender by such employer and such employee, as between themselves, of their right to any other method, form or kind of compensation, or determination thereof, or to any other compensation, or kind of determination thereof, or cause of action, action at law, suit in equity, or statutory or common-law right or remedy, or proceeding whatever, for or on account of any personal injury to or death of such employee, except as such rights may be hereinafter specifically granted; * * *." (Bold face type ours.)

Whether or not these sections preclude the bringing of an action at law by an employee for injury or death not compensable under the Act when both employer and employee have elected to be bound by the Act, has not been definitely adjudicated. It must be remembered that "injury" and "death resulting from injury" are limited by definition in the Act. (Secs. 2864 and 2870 above quoted.)

In *Wirta v. North Butte Mining Co.*, 64 Mont. 279, 210 P. 332 (1922), *supra*, the above sections were construed by the court. In the opinion, the court said:

"That the Compensation Act of this state, in so far as it provides compensation to an injured employee for injuries received from an accident growing out of and in the course of his employment is exclusive of all other remedies, is unquestionable." (Bold face type ours.)

And, near the end of the opinion, the statement appears:

"The court is of the opinion that both the plaintiff and the defendant mining company are bound by the Workmen's Compensation Law of this state, which is exclusive of all other remedies, and that compensation to the plaintiff for the injuries sustained by him due to the accident complained of must be under the terms of that act and not otherwise. * * *." (Bold face type ours.)

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Under the facts, however, since both plaintiff and defendant were within the Act and since the injury was one for which compensation was provided, the court needed only to decide that as to such injury the Act was exclusive; a more inclusive statement would be only dictum. The issue appears to be an open one, not as yet definitely adjudicated by the Montana courts.

II. Other Statutes.

I. Safety Provisions of the Workmen's Compensation Act: Secs. 3012-3033.

Sec. 3012 provides that no employer shall construct, maintain, operate, or cause to be constructed, maintained, or operated, any place of employment that is not safe.

Sec. 2860 (a prior section of the Act) defines a "reasonably safe place to work" as one which "has been made as free from danger to the life or safety of the employee as the nature of the employment will reasonably permit."

Sec. 3014 grants to the Board supervision over every place of employment necessary for the adequate enforcement and administration of all laws and orders requiring places of employment to be safe and the lives and safety of employees therein to be safe, and requiring the protection of the life and safety of every employee in such employment or place of employment.

Sec. 3015 empowers the Board:

"1. To declare and prescribe such safety devices, safeguards, or other means or methods of protection as are well adapted to render employees and places of employment safe;

"2. To fix such reasonable standards and to prescribe, modify, and enforce such reasonable orders for the adoption, installation, use, maintenance, and operation of safety devices, safeguards, and other means and methods of protection, as may be necessary for the protection of the life and safety of employees;

"3. To fix and order such reasonable standards for the construction, repair, and maintenance of places of employment as shall render them safe;

"4. To require the performance of any act necessary for the protection of life and safety of employees; * * *."

No rules or regulations have been adopted by the Board under the authority of this section.

Sec. 3025 provides that, where the Board finds that a place of

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employment is unsafe or does not afford adequate protection to employees, it shall enter and direct that changes be made within a fixed time, and such safety devices, etc., be provided as will render the place of employment safe.

Sec. 3027 provides that, where the Board has reason to believe that a place is not safe or does not afford adequate protection to employees, it may summarily investigate, with or without notice or hearing, and make such order as may be necessary relative thereto.

Sec. 3028 provides that every employer and employee must comply with every order, decision, direction, rule, or regulation made by the Board, and do everything necessary and proper to secure compliance therewith.

Sec. 3032 provides that, where by careless management or otherwise a place of employment is unduly dangerous as compared with like employments, and the employer has not complied with the safety provisions of this Act and is one who has insured his liability under the Act by payment into the industrial accident fund, the Board shall advance the rate of paying into such fund 50%. This increased rate will continue until the place of employment ceases to become unduly dangerous, as compared with other like employments, and the employer shall have obtained a certificate of the examiner, as provided in the Act.

Sec. 3033 provides that a violation of any safety provision or a refusal to comply therewith constitutes a misdemeanor.

2. State Board of Health: Ch. 192 of the Political Code, Secs. 2444-2484.

Sec. 2448 provides that the State Board of Health shall make sanitary investigations and inquiries regarding the effects of employments on the health of the people.

Sec. 2450 empowers the Board "♦ ♦ ♦ to promulgate and enforce such rules and regulations for the better preservation of the public health in contagious and epidemic diseases as it shall deem necessary, and also regarding the causes and prevention of diseases, and their development and spread; ♦ ♦ ♦" The refusal to comply with such rules or regulations after written notice subjects the person so refusing to a penalty.

The State Board of Health has not, under authority of the above sections, promulgated any rules or regulations relating to dust hazards in industry.

3. Child Labor: Ch. 221 of the Political Code, Secs. 3095-3104.

Sec. 3095 prohibits the employment of children under six-

teen years of age in any mine, mill, smelter, workshop, factory, or where any machinery is operated, or in any occupation not enumerated which is known to be dangerous, or unhealthy, or detrimental to the morals of such children.

In *Burk v. Montana Power Co.*, 79 Mont. 52, 255 P. 337 (1927), it was held that an action for injuries based upon that part of the section which prohibits the employment of children under sixteen years "in any occupation not herein enumerated which is known to be dangerous," will fail if the facts are not such that the court will take judicial notice that the occupation is one known to be dangerous. It was so held because it is a penal statute, and as such it cannot leave to the jury to say whether or not an act is a crime.

Sec. 3100 provides a penalty for violation of the above statute.

Sec. 3101 deals specifically with the prohibition of children under the age of sixteen from working in mines.

Secs. 3102 and 3104 provide penalties for violation of this and other provisions of the Act.

4. Regulation of Quartz Mining: Ch. 249 of the Political Code, Secs. 3418-3435.

Sec. 3432 places upon the owners of quartz mines the duty of properly ventilating their mines when men are working to a greater depth than 300 feet and also of providing reasonable means for carrying away noxious fumes, gas, or smoke.

Sec. 3435 provides the penalty for failure to comply therewith.

5. Regulation of Coal-mining: Ch. 252 of the Political Code, Secs. 3447-3546.

Sec. 3501 places a duty upon the owners of coal mines to maintain means of ventilation for the circulation of air sufficient to dilute, carry off, and render harmless any noxious or dangerous gases generated from their mines; specific requirements are made as to the amount of air and the method of measurement of the same.

Sec. 3503 limits the number of men permitted to work in a single air current.

Sec. 3505 enumerates certain rules regarding the operation of ventilating fans.

Sec. 3511 provides that airways of sufficient diameter be maintained.

Sec. 3514 provides that, where coal dust or other inflammable material may accumulate, such must be properly saturated with water or some other compound as often as necessary, and that

all accumulated matter, explosive in its nature, must be removed from the mine.

Sec. 3525 provides that each miner shall examine his working place upon entering the same and shall not commence work until it is made safe. He must also be careful to keep his working place in safe condition at all times. If it becomes dangerous to such an extent that he cannot take care of it, he must immediately cease work and notify the foreman, and he is not then to return to work until ordered to do so by the foreman.

Sec. 3545 provides penalties for failure to observe any of the provisions of the Act.

6. Obligations of Employer: Ch. 31 of Part V of the Civil Code, Secs. 7756-7767.

Sec. 7757:

"An employer must indemnify his employee, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful."

Sec. 7758:

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed."

Sec. 7759:

"An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care."

In *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 P. 29 (1906), which was decided before the enactment of the Workmen's Compensation Act, it was held that the above three sections apply to actions brought by employees for personal injuries sustained in the course of employment. The action in that case was based upon the negligence of the employer in permitting a pile of lumber to fall upon plaintiff, injuring his leg. That issue and the issue of assumed risk were submitted to the jury, which returned a verdict for the plaintiff. The defenses of contributory negligence and negligence of fellow servant, although pleaded, did not go to the jury because they were not applicable under the evidence as presented.

Secs. 7761 and 7763 provide that the owner of any mine, smelter, or mill for the refining of ores shall be liable for any and all damages sustained by an employee thereof, without contributory negligence on his part, when such damages are caused by the negligence of any superintendent, foreman, shift-boss, hoisting or other engineer, or crane-man.

III. Common Law Liability.

Although no case has been found wherein an employee recovered damages in a common law action for injury or death resulting from an occupational disease caused by the inhalation of dust polluted air in the course of his employment and predicated upon the employer's negligence, it is assumed that Montana would follow the more general rule and hold that a right of action does exist under such circumstances. This would not be the case, however, with respect to an employer who has elected to operate under the Act, if it is held eventually that the Act is exclusive by reason of the language of Sections 2838 and 2839.

IV. Miscellaneous Matters of Interest.

1. **Statute of Limitations.** An action for personal injuries comes within Sec. 9031 (3), which provided a three year limitation for an action upon an obligation or liability, not founded upon an instrument in writing, other than a contract, account, or promise. Sec. 9031 (2) provides the same limitation for an action to recover damages for the death of one caused by the wrongful act or neglect of another.

2. **Pending Legislation.** There are at present no bills pending in the Legislature relating to precautionary measures to be taken with respect to dust hazards or to recovery for diseases resulting from the inhalation of dust by employees in the course of their employment. We are advised that serious consideration is being given to the introduction of such legislation at the next session of the Legislature.



PRESENTED BY

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